TRANSCRIPT OF RECORD.

164-704

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~881~~. 429

JAMES DYER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED FEBRUARY 3, 1896.

(16,171.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 23, 1896.

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a In the District Court of the United States for the Western District of Arkansas.

Pleas and proceedings before the Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, in case of—

UNITED STATES
vs.
JAMES DYER. } Indictment for Robbery. No. 5566.

1 UNITED STATES OF AMERICA,
Western District of Arkansas.

In the District Court, Aug. Term, A. D. 1895.

UNITED STATES
versus
JAMES DYER, and NATHANIEL REED, and BUZ LUCKEY, and WADE CHAMBERLEE, and TOM ROOT, and WILL SMITH.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present that James Dyer, and Wade Chamberlee, and Nathaniel Reed, and Buz Luckey, and Tom Root, and Will Smith, on the 13 day of Nov., A. D. 1894, at the Creek nation, in the Indian country, within the western district of Arkansas aforesaid, in and upon George Levering, a white man and not an Indian, then and there being, feloniously an assault did make, and him, the said George Levering, with force and arms in bodily fear and danger of his life did put, and the following money of the paper currency of the United States of America, to wit, one Treasury notes, one national bank note, one gold certificate, one silver certificate of the denomination and value of twenty dollars each, one Treasury note, one national bank note, one gold certificate, one silver certificate of the denomination and value of ten dollars each, one Treasury note, one national bank note, one gold certificate, one silver certificate of the denomination and value of five dollars each, one silver certificate, one greenback bill of the denomination and value of one dollar each, and the following coins of the silver coinage of the United States of America, to wit, ten silver dollars of the denomination and value of one dollar each, ten silver half dollars of the denomination and value of one-half dollar each, ten quarter dollars of the denomination and value of one-quarter dollar each, ten silver dimes of denomination and value of one dime each, and the following coins of the gold coinage of the United States of America, to wit, ten gold coins of denomination and value of twenty dollars each, ten gold coins of denomination and value of ten dollars each, ten gold coin- of denomination and value of five dollars each, a more particular description of all of said money being to

the said grand jurors unknown, and one pistol of the value of twenty dollars, all of the goods and chattels of the said George Levering, from the possession and in the presence and against the will of the said George Levering, with force and arms then and there, feloniously, violently, forcibly, and by putting in fear and danger of his life the said George Levering, did seize, steal, take, and carry with the intent from him, the said George Levering, to rob and steal, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

2 *2nd Count.*

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present that James Dyer, and Nathaniel Reed, and Wade Chamberlee, and Buz Luckey, and Tom Root, and Will Smith, on the 13 day of Nov., A. D. 1894, at the Creek nation, in the Indian country, within the western district of Arkansas aforesaid, in and upon Alfred Marlow, a white man and not an Indian, then and there being, feloniously an assault did make, and him, the said Alfred Marlow, with force and arms in bodily fear and danger of his life did put, and the following money of the paper currency of the United States of America, to wit, two Treasury notes, one national bank note, one gold certificate, one silver certificate of the denomination and value of twenty dollars each, one Treasury note, one national bank note, one gold certificate, — silver certificate of the denomination and value of ten dollars each, one Treasury note, one national bank note, one gold certificate, one silver certificate of the denomination and value of five dollars each, one silver certificate, one greenback bill of the denomination and value of one dollar each, and the following coins of the silver coinage of the United States of America, to wit, ten silver dollars of the denomination and value of one dollar each, ten silver half dollars of the denomination and value of one-half dollar each, ten quarter dollars of the denomination and value of one-quarter dollar each, ten silver dimes of denomination and value of one dime each, and the following coins of the gold coinage of the United States of America, to wit, ten gold coins of denomination and value of twenty dollars each, ten gold coins of denomination and value of ten dollars each, ten gold coin- of denomination and value of five dollars each, a more particular description of all of said money being to the said grand jurors unknown, and one pistol of the value of twenty dollars, all of the goods and chattels of the said Alfred Marlow, from the possession and in the presence and against the will of the said Alfred Marlow, with force and arms then and there, feloniously, violently, forcibly, and by putting in fear and danger of his life the said Alfred Marlow, did seize, steal, take, and carry with the intent from him, the said Alfred Marlow, to rob and steal, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

3 *3rd Count.*

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present that James Dyer, and Nathaniel Reed, and Wade Chamberlee, and Tom Root, and Buz Luckey, and Will Smith, on the 13 day of Nov., A. D. 1894, at the Creek nation, in the Indian country, within the western district of Arkansas aforesaid, in and upon Sam Sondheimer, a white man and not an Indian, then and there being, feloniously an assault did make, and him, the said Sam Sondheimer, with force and arms in bodily fear and danger of his life did put, and the following money of the paper currency of the United States America, to wit, two Treasury notes, one national bank note, one gold certificate, one silver certificate of the denomination and value of twenty dollars each, one Treasury note, one national bank note, one gold certificate, — silver certificate of the denomination and value of ten dollars each, one Treasury note, one national bank note, one gold certificate, one silver certificate of the denomination and value of five dollars each, one silver certificate, one greenback bill of the denomination and value of one dollar each, and the following coins of the silver coinage of the United States of America, to wit, ten silver dollars of the denomination and value of one dollar each, ten silver half dollars of the denomination and value of one-half dollar each, ten quarter dollars of the denomination and value of one-quarter dollar each, ten silver dimes of denomination and value of one dime each, and the following coins of the gold coinage of the United States of America, to wit, ten gold coins of denomination and value of twenty dollars each, ten gold coins of denomination and value of ten dollars each, ten gold coin- of denomination and value of five dollars each, a more particular description of all of said money being to the said grand jurors unknown, all of the goods and chattels of Sam Sondheimer, from the possession and in the presence and against the will of the said Sam Sondheimer, with force and arms then and there, feloniously, violently, forcibly, and by putting in fear and danger of his life the said Sam Sondheimer, did seize, steal, take, and carry with the intent from him, the said Sam Sondheimer, to rob and steal, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

4 *4th Count.*

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present that James Dyer, and Nathaniel Reed, and Wade Chamberlee, and Tom Root, and Buz Luckey, and Will Smith, on the 13 day of Nov., A. D. 1894, at the Creek nation, in the Indian country, within the western district of Arkansas aforesaid, in and upon C. S. Cannon, whose Christian name is to the grand jurors unknown, a white man and not an Indian, then and there being, feloniously an assault

did make, and him, the said C. S. Cannon, with force and arms in bodily fear and danger of his life did put, and the following money of the paper currency of the United States of America, to wit, two Treasury notes, one national bank note, one gold certificate, one silver certificate of the denomination and value of twenty dollars each, one Treasury note, one national bank note, one gold certificate, one silver certificate of the denomination and value of ten dollars each, one Treasury note, one national bank note, one gold certificate, one silver certificate of the denomination and value of five dollars each, one silver certificate, one greenback bill of the denomination and value of one dollar each, and the following coins of the silver coinage of the United States of America, to wit, ten silver dollars of the denomination and value of one dollar each, ten silver half dollars of the denomination and value of one-half dollar each, ten quarter dollars of the denomination and value of one-quarter dollar each, ten silver dimes of denomination and value of one dime each, and the following coins of the gold coinage of the United States of America, to wit, ten gold coins of denomination and value of twenty dollars each, ten gold coins of denomination and value of ten dollars each, ten gold coin- of denomination and value of five dollars each, a more particular description of all of said money being to the said grand jurors unknown, all of the goods and chattels of C. S. Cannon, from the possession and in the presence and against the will of the said C. S. Cannon, with force and arms then and there, feloniously, violently, forcibly, and by putting in fear and danger of his life the said C. S. Cannon, did seize, steal, take, and carry with the intent from him, the said C. S. Cannon, to rob and steal, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

5 *5th Count.*

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present that James Dyer, and Nathaniel Reed, and Wade Chamberlee, and Tom Root, and Buz Luckey, and Will Smith, on the 13 day of Nov., A. D. 1894, at the Creek nation, in the Indian country, within the western district of Arkansas aforesaid, in and upon S. K. Bullard, a white man and not an Indian, whose Christian name is to the grand jurors unknown, then and there being, feloniously an assault did make, and him, the said S. K. Bullard, with force and arms in bodily fear and danger of his life did put, and the following money of the paper currency of the United States of America, to wit, two Treasury notes, one national bank note, one gold certificate, one silver certificate of the denomination and value of twenty dollars each, one Treasury note, one national bank note, one gold certificate, one silver certificate of the denomination and value of ten dollars each, one Treasury note, one national bank note, one gold certificate, one silver certificate of the denomination and value of

five dollars each, one silver certificate, one greenback bill of the denomination and value of one dollar each, and the following coins of the silver coinage of the United States of America, to wit, ten silver dollars of the denomination and value of one dollar each, ten silver half dollars of the denomination and value of one-half dollar each, ten quarter dollars of the denomination and value of one-quarter dollar each, ten silver dimes of denomination and value of one dime each, and the following coins of the gold coinage of the United States of America, to wit, ten gold coins of denomination and value of twenty dollars each, ten gold coins of denomination and value of ten dollars each, ten gold coin- of denomination and value of five dollars each, a more particular description of all of said money being to the said grand jurors unknown, and one watch of the value of one hundred dollars, all of the goods and chattels of the said S. K. Bullard, from the possession and in the presence and against the will of the said S. K. Bullard, with force and arms then and there, feloniously, violently, forcibly, and by putting in fear and danger of his life the said S. K. Bullard, did seize, steal, take, and carry with the intent from him, the said S. K. Bullard, to rob and steal, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

6 *6th Count.*

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present that James Dyer, and Nathaniel Reed, and Wade Chamberlee, and Tom Root, and Buz Luckey, and Will Smith, on the 13 day of Nov., A. D. 1894, at the Creek nation, in the Indian country, within the western district of Arkansas aforesaid, in and upon John W. Springer, a white man and not an Indian, then and there being, feloniously an assault did make, and him, the said John W. Springer, with force and arms in bodily fear and danger of his life did put, and the following money of the paper currency of the United States of America, to wit, two Treasury notes, one national bank note, one gold certificate, one silver certificate of the denomination and value of twenty dollars each, one Treasury note, one national bank note, one gold certificate, one silver certificate of the denomination and value of ten dollars each, one Treasury note, one national bank note, one gold certificate, one silver certificate of the denomination and value of five dollars each, silver certificate, one greenback bill of the denomination and value of one dollar each, and the following coins of the silver coinage of the United States of America, to wit, ten silver dollars of the denomination and value of one dollar each, ten silver half dollars of the denomination and value of one-half dollar each, ten quarter dollars of the denomination and value of one-quarter dollar each, ten silver dimes of denomination and value of one dime each, and the following coins of the gold coinage of the United States of America, to wit, ten gold coins of denomination and value of twenty dollars each, ten gold

coins of denomination and value of ten dollars each, ten gold coin of denomination and value of five dollars each, a more particular description of all of said money being to the said grand jurors unknown, and one watch of the value of $100, all of the goods and chattels of the said John W. Springer, from the possession and in the presence and against the will of the said John W. Springer, with force and arms then and there, feloniously, violently, forcibly, and by putting in fear and danger of his life the said John W. Springer, did seize, steal, take, and carry with the intent from him, the said John W. Springer, to rob and steal, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

JAS. F. READ,
U. S. District Attorney, Western District of Arkansas.

[Endorsed:] No. 5566. United States *versus* James Dyer, and Nathaniel Reed, and Wade Chamberlee, and Tom Root, Buz Luckey, and Will Smith. Robbery. A true bill. E. J. Black, foreman. Witnesses: L. N. Best, Wagner, I. T.; R. M. Reynolds, Wagner, I. T.; Ben. Strickland, Wagner, I. T.; E. B. Alberty, Wagner, I. T.; W. C. Smith, Fayetteville, Ark., and witnesses in No. 5064. Filed Aug. 17, 1895. S. Wheeler, clerk, by J. M. Dodge, D. C.

7 *Record Entries.*

In the District Court of the United States for the Western District of Arkansas, Aug. Term, 1895.

SATURDAY MORNING, 8½ O'CLOCK, *Aug.* 17, 1895.

Court met pursuant to adjournment.

Present: The Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES *vs.* JAMES DYER, NATHAN REED, WADE Chamberlee, Tom Root, and Buz Luckey.	Indictment for Robbery. No. 5566.

On this day come the United States of America, by Jas. F. Read, Esq., attorney for the western district of Arkansas, and come the said defendants in custody of the marshal and by their attorneys, and having jointly had hearing of said indictment, and it being demanded of them separately concerning said indictment above specified and charged upon them how they would acquit themselves thereof, they say each for himself that they are not guilty as charged in said indictment, and put themselves upon the country.

TUESDAY, *Aug.* 20, 1895.

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application, verified upon oath, praying for witnesses in his behalf at the expense of the United States.

WEDNESDAY, *Aug.* 21*st*, 1895.

(Caption omitted.)

On this day come on to be heard the application filed Aug. 20, 1895, for witnesses herein, and the court, being fully advised in the premises, doth allow the same.

It is therefore ordered that the legal expense of procuring the testimony of Ed. Rice, Jas. Collier, Mose Price, Scott Gentry, Jo Cassiver, F. M. Davis, and Sam. Cobb in behalf of said defendant be paid by the United States, and that a subpœna be issued for them, returnable forthwith.

8 THURSDAY, *Sept.* 5, 1895.

(Caption omitted.)

On this day come- the said defendant, by his attorney, and files his application, verified upon oath, praying for witnesses in his behalf at the expense of the United States.

Said application coming on to be heard and the court being fully advised in the premises, doth overrule the same.

TUESDAY, *Sept.* 17, 1895.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, Esq., attorney for the western district of Arkansas, and come the said defendants, Jas. Dyer, Wade Chamberlee, and Tom Root, in their own proper persons, and Nathan Reed and Buz Luckey in custody of the marshal and by their attorneys, Messrs. Barnes & Mellette and C. J. Frederick, Esq., for Jas. Dyer; Messrs. Cravens & Cravens for Wade Chamberlee, and J. Warren Reed for Buz Luckey. Whereupon it is ordered by the court that this case be severed as to Tom Root and Nathan Reed for the purpose of trial of the other defendant; and defendants having heretofore had hearing of said indictment and pleaded not guilty thereto, it is, on motion of plaintiff, by its attorney, ordered that a jury come to try the issue joined. Whereupon the following were selected for the trial of this cause, to wit:

Henry W. Chronister,	David Garner,	Jas. H. Jackson,
Elisha C. Davis,	Benj. F. Hicks,	Wilburn Jay,
Jno. N. Ferguson,	Jesse C. Harper,	Wm. R. Owens,
Jas. A. Freeling,	Jas. N. Jones,	Jas. N. Phillips,

twelve good and lawful men of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence, and after hearing a portion of the evidence and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court; and it is further ordered that said jury be kept together, and that the marshal of this district furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

9 WEDNESDAY, *Sept.* 18, 1895.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, Esq., attorney for the western district of Arkansas, and come the said defendants, Jas. Dyer in his own proper person and by his attorneys, Messrs. Barnes & Mellette and C. J. Frederick, Esq.; Wade Chamberlee in his own proper person and by his attorneys, Messrs. Cravens & Cravens, and Buz Luckey in custody of the marshal and by his attorney, J. Warren Reed, Esq.; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit:

Henry W. Chronister,	David Garner,	Jas. H. Jackson,
Elisha C. Davis,	Benj. F. Hicks,	Wilburn Jay,
Jno. N. Ferguson,	Jesse C. Harper,	Wm. R. Owen,
Jas. A. Freeling,	Jas. N. Jones,	Jas. N. Phillips,

who took their seats in the jury-box, and, after hearing further evidence and there not being time to further progress in the trial of this cause, they were put in charge of the sworn bailiff aforesaid.

THURSDAY, *Sept.* 19, 1895.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, Esq., attorney for the western district of Arkansas, and come the said defendants, James Dyer in his own proper person and by his attorneys, Messrs. Barnes & Mellette and C. J. Frederick, Esq.; Wade Chamberlee in his own proper person and by his attorneys, Messrs. Cravens & Cravens, and Buz Luckey in custody of the marshal and by his attorney, J. Warren Reed, Esq.; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit:

Henry W. Chronister,	David Garner,	Jas. H. Jackson,
Elisha C. Davis,	Benj. F. Hicks,	Wilburn Jay,
Jno. N. Ferguson,	Jesse C. Harper,	Wm. R. Owens,
Jas. A. Freeling,	Jas. N. Jones,	Jas. N. Phillips,

who took their seats in the jury-box, and, after hearing the remainder of the evidence and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court.

10 FRIDAY, *Sept.* 20, 1895.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, Esq., attorney for the western district of Arkansas, and come the said defendants, James Dyer in his own proper person and by his attorneys, Messrs. Barnes & Mellette and C. J. Frederick, Esq.; Wade Chamberlee in his own proper person and by his attorneys, Messrs. Cravens & Cravens, and Buz Luckey in custody of the

marshal and by his attorney, J. Warren Reed, Esq.; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit:

Henry W. Chronister,	David Garner,	Jas. H. Jackson,
Elisha C. Davis,	Benj. F. Hicks,	Wilburn Jay,
Jno. N. Ferguson,	Jesse C. Harper,	Wm. R. Owens,
Jas. A. Freeling,	Jas. N. Jones,	Jas. N. Phillips,

who took their seats in the jury-box, and, after hearing the argument of counsel and receiving the charge of the court, to which charge defendant filed exceptions, said jury retired in charge of the sworn bailiff aforesaid to consider of their verdict.

SATURDAY, *Sept.* 21, 1895.

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, Esq., attorney for the western district of Arkansas, and come the said defendants, Jas. Dyer in his own proper person and by his attorneys, Messrs. Barnes & Mellette & C. J. Frederick, Esq.; Wade Chamberlee in his own proper person and by his attorneys, Messrs. Cravens & Cravens, and Buz Luckey in custody of the marshal and by his attorney, J. Warren Reed, Esq.; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit:

Henry W. Chronister,	David Garner,	Jas. H. Jackson,
Elisha C. Davis,	Benj. F. Hicks,	Wilburn Jay,
Jno. N. Ferguson,	Jesse C. Harper,	Wm. R. Owen,
Jas. A. Freeling,	Jas. N. Jones,	Jas. N. Phillips,

who returned into court the following verdict, to wit:

"We, the jury, find the defendants James Dyer and Buz Luckey guilty of robbery, as charged in the second, fifth, and sixth counts of the within indictment."

(Signed) DAVID GARNER, *Foreman.*

"We, the jury, find the defendant Wade Chamberlee not
11 guilty of robbery, as charged in the within indictment."

(Signed) DAVID GARNER, *Foreman.*

Whereupon by order of the court the jury was discharged from the further consideration of the case, and said defendants, James Dyer and Buz Luckey, were committed to the custody of the marshal to await final sentence, and Wade Chamberlee was discharged of and from said indictment.

MONDAY, *Sept.* 30, 1895.

(Caption omitted.)

On this day comes said defendant, James Dyer, by his attorney, and files his motion to set aside the verdict of the jury and for a new trial in this cause.

SATURDAY, *Oct.* 12, 1895.

(Caption omitted.)

On this day come on to be heard the motion heretofore filed to set aside the verdict of the jury and for a new trial in this cause, and the court, being well and sufficiently advised in the premises, doth overrule the same.

TUESDAY, *Oct.* 22, 1895.

(Caption omitted.)

On this day come the said defendant, by his attorney, C. J. Frederick, Esq., and presents his bill of exceptions herein and asks that the same be signed and made a part of the record, which is accordingly done.

FRIDAY, *Oct.* 25, 1895.

(Caption omitted.)

Comes defendant and files his assignment of errors in above case; also at same time files petition for writ of error.

(Caption omitted.)

Defendant having sued out writ of error and citation having been served, it is ordered that defendant be permitted to give bail in sum of $8,000.

12 In the District Court of the U. S. for the Western District of Arkansas, Aug. Term, 1895.

TUESDAY MORNING, 8½ O'CLOCK, *Oct. 15th, A. D.* 1895.

Court met pursuant to adjournment.

Present: The Honorable Isaac C. Parker, judge of the district and circuit courts of the United States for the western district of Arkansas.

UNITED STATES *versus* JAMES DYER.	No. 5566.	Indictment for Robbery (2nd Count) in the Indian Country.

On motion of Jas. F. Read, Esq., attorney for the western district of Arkansas, the said defendant, James Dyer, was brought to the bar of the court in custody of the marshal of said district, and, it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty (2nd c't) heretofore returned against him by the jury in this cause on the 21 day of Sept., A. D. 1895, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court here that the said James Dyer, for his felony aforesaid, be imprisoned in the Ohio State penitentiary, situated at Columbus, in the State of Ohio, for

the term and period of five (5) years from this date, and that he pay to the United States of America a fine of five hundred (500) dollars, together with all their costs in and about the prosecution laid out and expended, and that they have execution therefor.

It is further considered that the marshal of the western district of Arkansas, in whose custody the said James Dyer is now here committed, receive and safely keep and convey the body of the said James Dyer hence to said penitentiary in the State of Ohio without delay and deliver him to the custody of the keeper of said penitentiary, who will receive and safely keep the said —— —— in jail in execution of the sentence aforesaid and in conformity with the same for the full period of the time aforesaid.

And it is further ordered that the clerk of this court furnish the marshal of this district with two duly certified copies of this judgment, sentence, and order, one of which shall be delivered to the keeper of said penitentiary and the other returned by the marshal to this court, with a full and true account of the execution of the same.

[Endorsed:] United States *vs.* —— ——. Mittimus.

13 TUESDAY MORNING, 8½ O'CLOCK, *Oct. 15th, A. D.* 1895.

Court met pursuant to adjournment.

Present: The Honorable Isaac C. Parker, judge of the district and circuit courts of the United States for the western district of Arkansas.

UNITED STATES *vs.* JAMES DYER. } No. 5566. Indictment for Robbery (5th Count) in the Indian Country.

On motion of Jas. F. Read, Esq., attorney for the western district of Arkansas, the said defendant, James Dyer, was brought to the bar of the court in custody of the marshal of said district, and, it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty (5th count) heretofore returned against him by the jury in this cause on the 21 day of Sept., A. D. 1895, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court here that the said James Dyer, for his felony aforesaid, be imprisoned in the Ohio State penitentiary, situated at Columbus, in the State of Ohio, for the term and period of five (5) years, and that he pay to the United States of America a fine of five hundred (500) dollars, together with all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

And it is further considered by the court that the above term of imprisonment shall commence and date from the expiration of a 5 years' term of imprisonment which the said James Dyer was this day sentenced to undergo upon indictment No. 5566 (2nd count).

It is further considered that the marshal of the western district of Arkansas, in whose custody the said James Dyer is now here committed, receive and safely keep and convey the body of the said James Dyer hence to said penitentiary in the State of Ohio without delay and deliver him to the custody of the keeper of said penitentiary, who will receive and safely keep the said James Dyer in jail in execution of the sentence aforesaid and in conformity with the same for the full period of the time aforesaid.

And it is further ordered that the clerk of this court furnish the marshal of this district with two duly certified copies of this judgment, sentence, and order, one of which shall be delivered to the keeper of said penitentiary and the other returned by the marshal to this court, with a full and true account of the execution of the same.

[Endorsed:] United States *vs.* ——— ———. Mittimus.

14 TUESDAY MORNING, 8½ O'CLOCK, *Oct. 15th, A. D.* 1895.

Court met pursuant to adjournment.

Present: The Honorable Isaac C. Parker, judge of the district and circuit courts of the United States for the western district of Arkansas.

UNITED STATES *vs.* JAMES DYER. } No. 5566. Indictment for Robbery (6th Count) in the Indian Country.

On motion of Jas. F. Read, Esq., attorney for the western district of Arkansas, the said defendant, James Dyer, was brought to the bar of the court in custody of the marshal of said district, and, it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty (6th count) heretofore returned against him by the jury in this cause on the 21 day of Sept., A. D. 1895, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court here that the said James Dyer, for his misdemeanor aforesaid, be imprisoned in the Ohio State penitentiary, situated at Columbus, in the State of Ohio, for the term and period of five (5) years, and that he pay to the United States of America a fine of five hundred (500) dollars, together with all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

And it is further considered by the court that the above term of imprisonment shall commence and date from the expiration of a 5 years' term of imprisonment which the said James Dyer was this day sentenced to undergo upon indictment No. 5566 (2nd count).

It is further considered that the marshal of the western district of Arkansas, in whose custody the said James Dyer is now here committed, receive and safely keep and convey the body of the said James Dyer hence to said penitentiary in the State of Ohio without

delay and deliver him to the custody of the keeper of said penitentiary, who will receive and safely keep the said James Dyer in jail in execution of the sentence aforesaid and in conformity with the same for the full period of the time aforesaid.

And it is further ordered that the clerk of this court furnish the marshal of this district with two duly certified copies of this judgment, sentence, and order, one of which shall be delivered to the keeper of said penitentiary and the other returned by the marshal to this court, with a full and true account of the execution of the same.

[Endorsed:] United States *vs.* —— ——. Mittimus.

15 *Bill of Exceptions.*

In the United States District Court for the Western District of Arkansas.

UNITED STATES
vs.
JAMES DYER.

Be it remembered that on this the 20th day of September, 1895, came on to be heard the above-styled case.

The district attorney, representing the United States, produced and examined J. W. SPRINGER, S. K. BULLARD, and ALFRED MARLOW, who testified that they were passengers on the Missouri, Kansas and Texas train the night of November the 13th, 1894, when the passengers thereon were robbed, and that each of them wa- robbed of money and other property, as described in the respective counts of the indictment; that the robbery occurred between ten and eleven o'clock at night at Blackstone, in the Creek nation, I. T.; that they saw only one of the robbers; Nathan Reed they identified as the one who came through the train and held his pistol on them and forced them to give up their property.

NATHAN REED testified that he was one of the men who committed the robbery; that the men who went to the train with him were Buz Luckey, Tom Root, and Will. Smith; that the robbery was talked of by Dyer for two months before it occurred; that a few days before the robbery James Dyer came to where he and Tom Root were in the woods, near Dick Reynold's house, and planned the robbery. It was agreed where the robbery should take place, but it was not definitely settled when it was to be done at this time. He saw and talked with Jim Dyer at his house the following Sunday preceding the robbery, which was on Tuesday night, and at the time the plan was perfected it had been agreed that Dyer should go to Van's ford with a wagon the night of the robbery for the purpose of helping them get away and assisting them, and that they were to meet him there after the robbery, but he, Reed, was shot at the robbery and
16 could not stand to be taken there and did not go to Van's ford after the robbery and does not know whether Dyer went

there or not. He lay out in the woods on a blanket until the Monday night following the robbery, when he went to*n* Dyer's house, where he remained until the next Friday at noon, Dyer having stated that the marshals were coming; that his wounds bled for eight or nine days; that when he went to Dyer's house he saw there and talked with Jim Dyer, his wife, Nick. Weldon, Lorena Long, and Mrs. Bowers, who were all living there; that after leaving Dyer's house and remaining in the woods for some days Jim Dyer and his brother Joe came to him and sent him out of the country by a man named Ed. Smith, who took him to Seneca, Missouri, in a wagon and left him at the house of a man named William Lawrence. After remaining for some time at Lawrence's he sent Lawrence to Jim Dyer's for money and Lawrence brought him back $48.00; that afterward he went to his brother's, in North Arkansas, and was captured there in March, 1895, and brought to Fort Smith and indicted jointly with Dyer and the other defendants in this case on this charge; that he has never been tried, and that the charge was still pending against him on a plea of not guilty; that he had known Jim Dyer two years before the robbery, during which time Dyer's house was his headquarters and during which time he saw various outlaws at Dyer's.

That there was secured from this robbery about $280 and 15 watches; that Luckey, Root, and Bill Smith got 15 dollars each and a watch each of the proceeds of the robbery the night of the robbery, and the balance of the money and watches were left with him. The watches and money he turned over to Dyer. Dyer went to Texas to see the U. S. marshal. Dyer owed him $300.00 or $400.00 for cattle, which he said that Dyer refused to pay until Dyer was relieved from liability on a bond which Dyer was security for Reed and which bond Reed had forfeited in 1893. After forfeiting the bond he came to Dyer's and remained there from time to time while scouting from the officers. Dyer advised him not to stand trial; that he did not want him to stand trial; that Dyer, Root, Smith, Luckey, and himself were to share the booty from the robbery equally.

17 JAMES LEE and JAMES BRAZEEL testified that ten or twelve days after the robbery they searched Dyer's house; that in the left of the house they found a bloody quilt, a bandage, and bottle of medicine. They were looking for the men who committed the robbery. The loft in which the things wer*d* found was accessible only by climbing to the ceiling by means of the bed; scuttle-hole would not be noticed in casual observation.

L. M. BEST testified that on the night of November 13th, 1894, the night of the Blackstone robbery, he saw Jim Dyer on horseback, about 11 o'clock at night, at Van's ford, which was about three and a half miles from Blackstone. Dyer whooped as he passed in the road. He saw no arms about Dyer. After that, on the same night, he saw Dyer in a camp at the edge of the prairie. When he saw Dyer in the bottom at Van's ford Best was on his way

to tell Jones about a horse which had been stolen from Jones, and that when he saw Dyer in the camp at the prairie on his return that night Jones, Collier, and Nelson were with him, going after the horse. The horse was gotten out of Dick Reynolds' pasture. He had had a conversation with Dyer in April last, when Dyer told him that he proved when he was arrested and taken to Muscogee shortly after the robbery that he was in Texas the night of the robbery; that he built the house of Dyer, and was told by Dyer to make the scuttle covering fit close, as he might want to hide some of his friends in the loft, and to build it so that it would not be noticed.

BEN. STRICKLER testified that he met Dyer two or three weeks before the robbery and Dyer spoke to him about a robbery, and asked him to go into it and share the proceeds; that he formerly lived near Dyer and knew him well.

TOM ROOT testified that he was arrested for this same robbery and was also under indictment jointly with Buz Luckey for the murder of a deputy marshal, and is jointly indicted with Luckey and Dyer for this robbery; that he is not under bond and has never been put in jail nor tried for either offence; that he was one of the
18 men who robbed the train at Blackstone on the night of November the 13th, 1894; that they were there at the robbery, besides himself and Nathan Reed, Buz Luckey and Bill Smith; that a few days before the robbery James Dyer came to where he and Nathan Reed were, near Dick Reynolds', and planned the robbery. He and Nathan Reed were both at that time scouting; that it was agreed that the train should be robbed at Blackstone, but the time was not agreed upon; that Buz Luckey and Bill Smith were not present at this time, and he and Reed got with them soon afterwards; that he saw Dyer no more until he saw him at this trial; that it was agreed that Dyer should go to Van's ford on the night of the robbery, and Nathan Reed and himself and Smith and Luckey were to rob the train and go to Van's ford; that they did not go to Van's ford because he, Reed, got shot in the robbery; that Reed could not stand the ride; that he has not been committed to jail on any of the charges against him, and he goes wherever he chooses; that the charges of murder and robbery against him stand in this court on pleas of not guilty; that he is a brother-in-law of Dick Reynolds, and he and Buz Luckey and Bill Smith went to Reynolds' house the night of the robbery, after the robbery, and told Reynolds that they had robbed the train and that Nathan Reed was shot, and that Reynolds went to where Reed was and took him provisions; that he sent his sister, Mrs. Elisa Reynolds, to Dyer after the robbery for some money, and she brought him $15.00. Before the conversation with Dyer near Dick Reynolds' he had talked with Dyer about robbing a train, and Dyer wanted him to rob the train at Inola.

Mrs. ELISA REYNOLDS testified that she was the sister of Tom Root and went, at Tom Root's request, to Jim Dyer for money; that

she saw no one except Jim Dyer and his wife. She told Dyer that Tom had sent her for money and wanted to leave the country. Dyer gave her 15 dollars for Tom.

WILLIAM LAWRENCE testified that he lived at Seneca, Mo., in the fall and winter of 1894. A man came to his house in a wagon, bringing a man who was disabled, and left the man at his
19 place with him. The man was Nath. Reed, and he thought he had rheumatism. Reed remained at his house several weeks. He got there about Christmas. He wanted Reed to pay him for taking care of Reed, and Reed sent him to Dyer for money. Dyer sent him $48.00 and said he owed him some more, and asked how Reed was getting.

HENRY SCALES testified that shortly after the robbery Buz Luckey came to his house at night, and while there showed him a peculiar pistol, the cylinder of which jumped out at the side—describing a new improved Colt's pistol—and told him that he had gotten it when he had robbed the train at Blackstone.

ANNY SCALES testified that she was present and heard statement by Luckey that he was in the Blackstone robbery.

GOLIAH SOLOMON testified that he is a deputy marshal and searched for Buz Luckey, and Luckey went on the scout the next day after the Blackstone robbery.

ALFRED MARLOW testified that he is a deputy marshal and was on the train the night it was robbed, and the robbers took from him a new improved Colt's pistol, the second one he had seen in that country; that such pistols were not in general use there. This was substantially all that was offered by the Government.

The defendant James Dyer, to sustain the issues on his part, offered the following:

JAMES COLLIER testified that to the best of his knowledge it was the night after the robbery that L. M. Best came to tell Jones about his stolen horse, and that he, together with Nelson and Jones, returned with Best to get the horse, and that Best pointed out a man that he said was Dyer at the edge of the prairie at a movers' camp; that he thought they had talked of the robbery before this night; that he had first heard of the robbery from Darby Spradling, who was staying at Dyer's; that on the next morning after they went after the horse he saw Dyer, who said that if he had had his gun he would have shot Best's arms off—referring to having seen him the night before.

20 WILLIAM NELSON and —— JONES testified that it was the night after the robbery that Best came to let Jones know about the horse, and as they went with Best after the horse Best pointed out a man at a movers' camp and said, There is Jim Dyer; that they had heard of the robbery and talked about it before this night.

STERLING PRICE and SIMON K. PRICE testified that they were with Dyer on the afternoon before the robbery at night, and that they left the race-track after sundown. They went to Dyer's house that evening on their way home a short time after dark and remained there about an hour, and left defendant and his family and Joe Montgomery, Mrs. Bowers, and Mrs. Long there. It is ten or twelve miles from Dyer's house to Blackstone, where the robbery occurred; that they passed Dyer's house early next morning and Dyer was at home. They also testified that Dyer's reputation in the community was good as an honest and law-abiding man. Simon K. Price stated that he was under a charge of larceny now pending against him.

JOE MONTGOMERY testified that he was at Dyer's house all the night of the robbery, and that Dyer was at home that night and did not leave the house that night; that they heard of the robbery next morning from Mr. Fly, who came out from Wagoner early next morning. Dyer lived three miles from Wagoner. On the night of the robbery Lorena Long and Mrs. Bowers were at Jim Dyer's house, and the Prices left there about 8 or 9 o'clock; that he had lived at Dyer's, off and on, for four years; that during that time he had been arrested on a charge of receiving stolen goods taken in a robbery and was kept in jail two or three months, but was never indicted and finally released.

The defendant Jim Dyer offered testimony going to establish the fact that the reputation of the Government witness, L. M. Best, for truth was bad in the community where he lived:

B. F. EARP, after stating that the reputation of Best was bad, stated that Best had not been charged with any offence while he had known him; that he, Earp, had been arrested for cattle-stealing and introducing and selling whiskey in the Indian country, but had never been convicted.

21 M. B. PRICE testified that Lon Perry, an outlaw, was captured at his house.

WILLIAM BRADY stated that he had been arrested for murder, but was discharged before the commissioner.

SIMON K. PRICE states there is pending against him a charge of larceny.

JOE DYER testified that the testimony of Nathan Reed was entirely untrue as to him and his brother, James Dyer, assisting in getting Reed in a wagon and sending him out of the country; that Nathan Reed came to his house in January, 1893, and worked on a lease for a short time. Two or three months after he was arrested and put in jail at Muscogee and remained in jail about three months, when bail was furnished by Jim Dyer's wife; that Reed forfeited his bond; that he saw Reed at Jim Dyer's several times while he was dodging from the officers; that Jim told Nath. that he

would pay him when the question of liability on his forfeited bond was settled; that he has been arrested *from* everything from murder to larceny, but has never been convicted of anything.

BUZ LUCKEY testified that he is now under sentence of death for murder, having been convicted at this term of court; that he never saw Jim Dyer until he saw him here in jail long after the robbery; that he was not with Root and Reed at the robbery and took no part in it, and was not present at the time or place of the robbery and was not present at any time with Jim Dyer when any robbery was planned or talked about; that he did not go on the scout after the robbery nor did he know that there had been a robbery committed; that he never had in his possession a pistol like the one described by the witness Henry Scales, and he made no statement that he had been in the robbery or that the pistol had come from the robbery.

The defendant JIM DYER testified in his own behalf that he did not have any talk or any agreement with Nathan Reed or Tom Root about robbing the train; that he knew nothing about it till afterwards, when he heard of it from Mr. Fly the morning after the robbery; that he lived twelve miles from place of the robbery; that he was not out that night about Van's ford and was not seen by L. M. Best, but a night or two after the robbery he was out near Van's ford, about three miles from his home, looking after some clearing he was having done, and stopped and talked with some movers and horse-traders; that he owed Nath. Reed $267.00 for cattle he had bought from Reed, and had paid him at one time $48.00, which he sent by Mr. Lawrence, and $10.00 that he had sent to Reed while he was in jail; that he never saw Reed at his house after the robbery, but had learned that Reed had been there while he had gone to Texas to see U. S. Marshal Williams about capturing the persons who robbed the train, but he never got a cent from Reed or any other person connected with the robbery; that he never got any watches or any other property from Reed or any other person coming from the robbery or any person connected with it; that he went to Paris, Texas, within forty-eight hours after he had heard of the robbery, for the purpose of seeing the chief marshal, Mr. Shelby Williams, with whom he had been personally acquainted for many years, and in pursuance with an agreement with Mr. Williams to give information that might lead to the capture of any train-robbers; that he was furnished with a free pass over the railroad by Mr. Williams, and that before going he had sent a telegram to Mr. Williams that he was coming. He denies *in toto* ever giving any direction to L. M. Best in reference to a scuttle-hole in the ceiling of his house. He also denies that he ever told L. M. Best to cut the scuttle-hole or to make it so it would not be seen or noticed, and that he might want to hide or conceal people in there; that at the time that Lee and Brazeel came there to search his house there were several bottles of horse liniment which he used in doctoring his horses, and the loft was used as a

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general plunder-room; that he owned about 150 head of horses, a stallion and jack, and has lived there for five years; that Nath. Reed was at his house after forfeiting his bond at Muscogee, and he told Reed he must i-demnify him on his bond; that he would not pay him until the bond question was settled, and that it has never yet been settled. He took no steps to turn Reed over to the authorities and cared nothing about his standing trial.

23 He knew the names of all the men engaged in the robbery within three or four days after it occurred, but could not say that he didn't state the names in forty-eight hours after the robbery; that he was willing to assist in giving information looking to the capture of Root, Luckey, and Smith, but that he would never agree to give Reed up, owing to his relations with Reed. He also stated that he had been arrested 3 times for murder, three times for larceny, and once for assault, but had never been convicted of anything; that various persons who were said to be outlaws had been at his house; that he formerly lived in Texas and left there in 1886 because he was in trouble there, but went back under arrest afterwards and was acquitted of all charges against him; that the officers had searched his premises three times for outlaws at the place which had been his home for the past five years.

W. M. SHOOK, STERLING PRICE, S. S. COBB, S. K. PRICE, M. C. DOYL, G. W. WILLIFORD, WILLIAM BRADY, B. F. EARP, GEORGE TRIBBLE, and JOHN EBBLILY testified that they had lived in the neighborhood of James Dyer and had known him for several years, and his reputation as an honest and law-abiding man was good in that neighborhood. All of the above-named witnesses except S. S. Cobb and W. M. Shook resided in the neighborhood where the Government witness, L. M. Best, lived, and that they had known him for several years, and that his reputation for truth in that neighborhood was bad, and the testimony did not show any of the above-named witnesses had been arrested for crime except William Brady, B. F. Park, and S. K. Price and not one of them has ever been convicted of anything. John Etherly, N. C. Doyle, and G. W. Williford could mention no one who had spoken of Best's characteristics except the witnesses for the defence in this case.

The defendant offered the witnesses COLLIER, SKEIN, ETHERLY, and FLY, who all testified that it is about 9 miles from Van's ford to Blackstone, where the robbery was committed; that it is three miles from Van's ford to Dyer's house; that it is about twelve miles to Blackstone from Dyer's; that they have lived in that

24 country for many years and know the distances, having passed over the ground often.

—— HOTCHKISS, the engineer that pulled the train that was robbed, testified that he had hunted through that country and it was about five miles to Van's ford from Blackstone.

The United States in rebuttal introduced Mr. and Mrs. HEFFLEFINGER, who testified that on the morning of November 14th, 1894,

they were taken to Talequah, a distance of thirty-five miles, by L. M. Best, U. S. witness, and that they all remained there until the 18th.

Three of the witnesses introduced by Buz Luckey to prove the bad reputation of Henry Scales, a witness against Luckey, had been arrested for the crime of Larceny, but had not been convicted.

This was all the evidence in the case.

The court then charged the jury as follows:

25 Gentlemen, there are three separate robberies charged here upon which the Government claims a verdict against these parties. These robberies are found in the second, fifth, and sixth counts in the indictment. You will understand in this connection that the Government does not claim any verdict at all against the defendant Wade Chamberlee. It would be your duty, under that condition, to sign the blank form of verdict here and return it in his favor, which would be a verdict of not guilty. The second count is a charge of robbery, because, as is alleged in that count, the other defendants, Buz Lucky and James Dyer, took certain property therein described as the property of Alfred Marlow, a white man and not an Indian. The money alleged to have been taken is described in the indictment in this count, but the court will only call your attention to the silver money in this count, described as ten silver dollars, ten silver half dollars, ten silver quarter dollars, and ten silver dimes. Of course, you will understand it is not necessary in these charges of larceny or robbery to find that all

26 the property charged was taken. If you find any of it, of any value whatever, was taken, that would be sufficient. In addition to that there is the charge of the taking of one pistol of the value of twenty dollars. That is the property named in that count of the indictment, the second count, and described as the property of Alfred Marlow.

The fifth count is property described as property of like nature—the same denomination of silver coins. I am putting it this way to shorten it and make it as short as possible; and in addition to that description of silver money, embracing dollars, half dollars, quarters, and dimes of these respective denominations and of these respective values, it is alleged that there was taken one watch of the value of one hundred dollars, the property of Mr. Bullard, the alleged owner of the property, named as being a white man.

The sixth count has the like description of money, described as silver money, as I have already given you in the other counts. In addition thereto it alleges the taking of one watch of the value of one hundred dollars, the property of John W. Springer. You remember Mr. Springer, the witness here. The watch is alleged to be of that value and alleged to be his property.

That, in short, is the description of the property alleged to have been taken from these respective parties at the time of the Blackstone robbery.

It is necessary to define these crimes, but one definition will answer, because it would describe all of them. They are all similar.

They only differ as to the ownership of the property and as to its value and as to its kind, the second count describing the property, outside of the silver money, as being taken is a pistol,
27 the other counts describing the property, outside of the silver money, as being taken as watches belonging to these respective gentlemen.

There is a difference between larceny and robbery. Larceny means the taking of the property of another against his will, the removing it from the place where taken with the intention of depriving the owner of the property. That is part of a robbery. Robbery is an aggravated larceny. It has other elements in it, and it is said to be aggravated because of the existence of these elements. It is not only an outrage and an insult to a man, but it is at the same time a deprivation of his property. You can deprive a man of his property by larceny without doing it in his presence or by violence or by putting him in fear. That would be larceny, if you would take it without these other elements existing, but to make a robbery the property must be taken, as the definition says, from his person by violence. That is the definition, in short, of a robbery. Now, it is necessary to have some explanation in order that you may understand it. "From his person" means either actually from his person, as if your pocket-book is taken from your pocket, or if it is taken from your presence the law recognizes it as being from the person. That is now the additional element that must exist to make robbery, and it must be done by putting in fear. That can be accomplished and is accomplished either by the use of actual violence upon the person, such as putting him in an attitude, by demonstration, with a deadly weapon, as that he has fear of his life if he does not yield to the demand of the robber or robbers, or it may be done constructively. A man may put another in fear without going to the extent of violence, without useing actual violence. A man comes into your house at night; he has not and is not offering any violence to you, but you see him in your
28 house, and he demands your property, makes that demand of you; he does not offer any actual violence and yet you give up your property; and why do you do it? Because you know that he is there under such circumstances as that he means to do you harm or he would attempt harm to accomplish his purpose. That is what is called constructive violence in the law. Under such circumstances you yield to him, you consent to part with the property because you fear that he may exercise actual violence upon you.

Now, in this case, if it be true that men had presented guns at these people on that train and they were firing into the car and all of that was going on there, these were acts of actual violence being exerted upon the parties who were present, and if these people parted with their property because of the exercise of that violence that would be actual violence so exerted upon them as to overcome their will power, and it would be a case where the property if taken from their pockets or if it was handed to them in pursuance of a demand of the robbers, then it would be taken from their persons

or from their presence and by violence or by putting them in fear; that makes out the crime of robbery. If you find that the property was taken and carried away from the place where found, and that the wills of the owners were overcome in that way, that makes the crime of robbery. That is what it consists of; that is what goes to make it up; and there is a peculiar indignity, I say, inflicted upon a man when a robbery is committed. It is an outrage to him; it is an insult to him. The law regards it that way, and therefore the crime is higher and greater than that of larceny. Again, it is regarded as higher because it is a direct conflict that may produce death. If a man offers resistance it is very likely that his life will pay the forfeit of his resistance, and it is an act so committed, committed under such circumstances, as that the law regards it as being dangerous to life, indirectly dangerous to life.

29 Now, then, in this case you are to find if this property or any of it described in these counts was taken. If the property was taken from separate men by separate demands or separate acts of violence upon them, that would be separate robberies, notwithstanding it may have been practically at the same place; it was the robbing of separate men—the taking of their property by the exercise of violence upon them.

Now, you bear in mind again that the crimes that the Government claims a verdict upon are found in the second, fifth, and sixth counts of this indictment.

That is the long and short of the crime; that is all there is to it; that is all it takes to make it out. You take this evidence and from it ascertain whether or not these crimes as charged were committed, and, if so, that is the first proposition to be found in the case; it is called the body of the offense—the fact that crimes were committed as charged.

The next step to be taken by you is to find out who it was that committed these crimes, how many persons committed them, and whether the two defendants, Dyer and Lucky, upon trial were so connected with those acts that are crimes as that under the law they are responsible as participants in them. That involves the proposition that more than one person may commit the same crime—may be guilty of committing the same crime. It is necessary that the court should explain that principle of the law. Especially is that true in a case where there is only constructive presence or may be only constructive presence upon the part of one of the defendants. It is necessary that you should note with care this principle of law to see how it is or how more than one person may commit the same crime—how they must be allied to the transaction that is a crime before they can be considered as participants in it. Now, the

30 law lays down these principles, and it lays them down clearly. It tells you how parties may connect themselves with an act that is a crime so that more than one may become responsible. There are two classes of persons known as criminals when a crime is committed by more than one. There are principals, and there are accessories before and after the fact. Unfortunately, for some reason—I do not know what—I suppose it is an omission—the Gov-

ernment of the United States has never yet, as applied to this jurisdiction, enacted any statute making it an offense to be guilty of an accessory or of being an accessory before the fact. Now, you are to note the difference between accessories and principals. If a crime is a felony, all principals are felons.

"Principals are such either in the first or second degree."

This division in the law of first and second degree amounts to nothing so far as criminality is concerned and so far as punishment is concerned, because the two degrees are regarded as the same.

"Principals in the first degree are those who are the immediate perpetrators of the act."

If a man with his own hand does an act that is a crime, he is regarded as a principal in the first degree.

"Principals in the second degree are those who did not with their own hands do the act, but were present aiding and abetting at it. It is not necessary, however, that this presence be strict, actual, and immediate so as to make the person an eye or ear witness of what passeth. It may be constructive presence. Thus, if several persons set out in concert, whether together or apart, upon a common design which is unlawful, each taking the part assigned him, some to commit the act and others to watch at proper distances to prevent a surprise or to favor the escape of the immediate actors, here,
31 if the act be committed, all are in the eye of the law present and principals, the immediate perpetrators in the first degree and the others in the second; but if the design is only to commit a small and inconsiderable trespass, such as robbing an orchard or the like, and one of them on a sudden affray, without the knowledge of the others, commits a felony—such, for example, as killing a pursuer—the others are not guilty of this felony. So where one did beat a constable in the execution of his office, and after he had been parted from him and had entirely desisted a friend of the party renewed the assault and killed the constable, the other party was held innocent of the killing, he having been not at all engaged after they were first separated; but if, in the former case, there had been a general resolution against all opposers, or, in the latter, a previous agreement to obstruct the constable in the execution of his office, all would have been alike guilty as principals. The principal in the second degree must be in a situation in which he might render his assistance in some manner to the commission of the offense, and this by agreement with the chief perpetrator; but the fact of conspiracy is not alone sufficient to raise a presumption that all the conspirators were constructively present at the commission of the crime, though it may be considered by the jury as tending to prove their presence. If, however, it is proved that the prisoner was one of the conspirators and was in a situation in which he might have given aid to the perpetrator at the time of the act done, it will be presumed that he was there for that purpose unless he shows satisfactorily that he was there for another purpose not connected with the crime."

Now, again upon that subject. There are many decided cases which decide who a participant is, how more than one person may

commit the same crime, and how they must be connected with that crime in order to make them responsible, and then
32 whether or not they need be actually at the place of the crime or whether they may become criminals, provided they are what is called constructively present. Now, there are several propositions it is necessary to lay down, in short, before I read this declaration of the law. If a man with his own hand does that which is a crime, he is responsible. If another or others are at the place of the crime and are in any way knowingly and understandingly engaged in assisting, advising, counselling, or abetting him to do the act, they are all just as guilty as he who with his own hand does the act. They are all responsible; that is, now, an actual participation in the crime and being present at the place of the crime. If they are at that place for the purpose of willfully and understandingly assisting in its perpetration, though they do nothing but go to the place with that object in view, the law says they are responsible just the same as though they had done the whole thing.

We now come to a proposition where a man need not be at the place of the crime. He may be a long distance away from it; but if he is so situated that he can in any way aid or assist in its perpetration, as by standing upon watch to prevent interruption, or aid in the escape of the parties, or give information, or do anything else that may contribute to that crime; if he is so situated with reference to the place of the crime as that he is able to do this, then you are not to stop to measure the distance where he may be from the place of the crime by yards or rods. The test is his ability from his situation to in some way assist in the perpetration of the crime, in its consummation, in the carrying out of the criminal design. If so, then he is not immediately at the place of the crime; he is constructively there in the law. Now, if he is so situated, and while so situated is doing anything to aid or assist or abet the crime, it is his act as well as the act of all those
33 who may with their own hands do it. If he is so situated with reference to the place of the crime—that is, I mean the distance from it in pursuance of a common understanding to become a participant in it—to aid in its perpetration by standing upon guard, by standing upon watch, by receiving the men who may come to him after the crime is committed, and he is there for that purpose, though he does not do it, because it is accomplished without that, because it is carried through without it, the law says he is responsible just as much as though he had entered upon the thing himself and done the whole act. Now, I proceed to read you the law upon that subject. Under any of these propositions I have named the defendant would be a participant in it or either one of them, if they were that way situated with reference to it, and the law would make them just as responsible as though they had done the whole thing with their own hands. It becomes necessary to give you what is meant by being present at the place of the crime. There are two kinds of presence that the law recognizes. There is actual presence—there is real presence—which means right at the place where the crime is committed, or there is constructive or legal

presence, which means so near to the place where the crime is committed as to be able to assist in the commission of it and to be actually assisting intentionally and knowingly, or to be so situated with reference to the place of the crime as to be able to assist or abet intentionally or knowingly the crime which is committed. That is called in the law constructive presence. It is, legally speaking, the same as real presence. The test of that presence is that he was so near to the place of the crime as to be able to assist or advise or counsel or abet the act as done. Then there comes in another subdivision, and that relates to how this assistance may be rendered—how it may be afforded the party who commits the
34 crime; but let us see for a moment as to what is meant by this idea of constructive presence. The law says that all persons who are knowingly and intentionally present at the time of the commission of a crime for the purpose of assisting in its commission, although one commit the act, provided all are proven to have confederated and engaged in the common design of which the perpetration of the crime is a part, become guilty of the crime as charged. This doctrine of criminal combination is firmly established in our criminal jurisprudence, and the cases furnish numerous illustrations. All are held responsible because the will of each individual contributed to it; each intended that the crime should be perpetrated. Now, what in the sense of the law is meant by being present, aiding and abetting? It is stated in Foster's Crown Law that "When the law requires the presence of the accomplice at the perpetration of the fact in order to render him a principal it does not require a strict, actual, immediate presence, such a presence as would make him an eye or ear witness of what passeth. Several persons set out together or in small parties upon one common design, be it murder or other felony or for any other purpose unlawful in itself, and each taketh the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent a surprise or to favor, if need be, the escape of those who are more immediately engaged. They are all, provided the fact be committed, in the eye of the law present at it, for it was made a common cause with them, each man operating in his station at one and the same instant towards the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang and to secure the success of their common enterprise."
35 That is the declaration of the principle as contained in the English law, which is the same substantially as the law declared in this country.

In the case of The State *v.* Ponyier, decided by a Louisiana court, it was said:

"The test to determine whether he is a principal rather than an accessory is whether he is so situated as to make his personal help available; not actual physical help necessarily, but help of any kind; not help rendered in or by actual presence, but constructive presence as well. Thus, if he watched near by or at a distance to prevent his companions being surprised, or stationed himself to give the alarm to favor their escape, or was in such situation as to come

to their assistance, so that the knowledge of his watching or position inspired or was calculated to inspire his companions with additional confidence and enable them the quicker or safer or more effectually to commit their crime, then he is a principal."

It is hardly proper to call it "moral support," because it is sort of a libel upon the word "moral;" but it is the exercise of intellectual influence. That is what it is. If a man is so situated with reference to the actual criminals, the actual perpetrators, he is watching at a distance to aid in any way, to give the alarm, or to aid in their escape, and the fact that he is so situated with reference to the crime inspires the men who actually do the deed because they have got a place where they can escape to, they have a place where they can go to, they have it at hand, they have assistance near by that they can call upon if it is necessary to call upon it—if that state of case exists, the law regards it as a condition where the men are inspired to commit the crime by the consciousness of that condition, by the consciousness of the fact that there is another party who is ready and
36 willing to aid them, and it does undoubtedly exert a great influence upon the minds of criminals, because it is an undertaking that requires great courage to enter upon the highway of crime—to stop a railroad train, for example, to undertake to blow up the express car, and to overcome the passengers and to relieve them of their money and of their property. It is a crime that is against all human nature; it is against all law that is right and proper; it is against the law of God and the law of the country, and men are so timid that they scarcely ever undertake a crime of that kind alone. There is one instance where a man up here about a year ago in Missouri did undertake it and robbed the train—one single man, a farmer, a young man who was raised in the country and who had no experience, even, with the crimes that are incident to towns. He robbed the train with the governor of the State upon it, and I will venture to say he was willing to swear there *was* twenty men robbed the train, but one lone robber undertook the enterprise and robbed the train successfully. That was an exception, however. It is a rare thing that it occurs. Men who enter upon a criminal design of that kind like to act under the consciousness that they have sympathy and support if it is necessary to be called upon and assistance near at hand, and when they act under that consciousness because of the fact that another may be upon watch at a distance who is in sympathy with them, who has the same criminal purpose that they have, or he is there for the purpose of aiding in their escape, that is a condition that the law considers that inspires them the more quickly to do the deed, according to the language of this law I have read.

"Each person consenting to the commission of an offense and doing any one act which is an ingredient in the crime or immediately connected with or leading to its commission is a principal."

37 Now, a little further upon this subject. This subject has received especial consideration in three noted American

cases. In the case of Commonwealth *v.* Knapp, tried many years ago, in 1830, in the State of Massachusetts, where Daniel Webster was prosecutor and where he delivered his celebrated speech on murder. The party who was convicted in that case, who was being prosecuted by Webster, was a party who was alleged to have been constructively present at the place of the crime. Another great case in which this doctrine was declared was the celebrated trial, in 1807, at Richmond, Virginia, of Aaron Burr, where the greatest jurist, the greatest man who ever sat on the bench in this country, presided at the trial—Chief Justice John Marshall—and where he recognized fully and entirely this doctrine of what is called constructive presence and the doctrine that a man may aid another in the commission of a crime without doing any actual physical act that contributes to that result. Another celebrated case tried but a few years ago in Chicago—the case of The State *v.* Spies—and which case was carried to the supreme court of that State, where the doctrine enunciated by the trial judge was clearly and distinctly sustained. Now, the court in the case of The Commonwealth *v.* Knapp repeats the doctrine I have already read you as quoted from Foster's Crown Law, where it is said that "When the law requireth the presence of the accomplice at the perpetration of the fact in order to render him a principal it doth not require a strict, actual, immediate presence—such a presence as would make him an eye or ear witness of what passeth. Several persons set out together or in small parties upon one common design, be it murder or other felony or for any other purpose unlawful in itself, and each taketh the part assigned him, some to commit the fact, others to watch at proper distances and stations to prevent a surprise or to favor, if need be, the escape of those who are more immediately engaged. They are all, provided the
38 fact be committed, in the eye of the law present at it, for it was a common cause with them; each man operated in his station at one and the same instant towards the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang and to insure the success of their common enterprise."

"Being present, in judgment of the law, is equivalent to being actually present, for, says Hawkins, 'the hope of their immediate assistance encourages and emboldens the murderer to commit the fact, which otherwise, perhaps, he would not have dared to do, and makes them guilty in the same degree (as principals) as if they had actually stood by with their swords drawn, ready to second the villainy.'"

"The person charged as a principal in the second degree must be present, and he must be aiding and abetting the crime."

Now, a word further as to this idea of what is meant by constructive presence. I have already told you that the test is that if a man is so near to the place, no matter how far in feet or yards he may be away; if from the circumstances, from the character of the act done and the way it is done he is so near to where it is actually done as to be able to render assistance or to contribute to the production of that act, and he is there actually doing so or is there

ready to do so willfully and intentionally, present in pursuance of a previous agreement, and he confederated to render aid and assistance, he is then present in the law. As an illustration take the case decided in Nevada, State *v.* Hamilton (13 Nev., 386), where the man was 30-odd miles from the place where a stage was robbed. He built a fire on the top of a mountain to signal to his confederates the approach of the stage, they being down in the valley, waiting to rob it. He was arrested as a principal in that crime, though, as a matter of fact, at the time of the robbery he was 30 or
39 35 odd miles away; but the law said he was present, because the test of the law as to what is meant by presence is fully satisfied, because the proof showed that he was able to render assistance that looked towards the consummation of that crime, towards the completion of it, towards the execution of it.

In another case—that of Breeze *v.* State (12 Ohio State, 146)—a man went to a store kept in the country and decoyed away the clerk who slept in that store and detained him at a dance while his confederates robbed the store. As a matter of fact, by yards and rods, he was a long distance away from the place of the robbery, but in contemplation of the law he was present, because at the very time of the robbery he was able to render assistance and was actually rendering assistance by decoying the clerk away from the store and decoying him away with the purpose in view that his confederates should have a better op-ortunity to consummate the crime.

Now, that is what is meant by actual and constructive presence. If some of the parties with their own hands commit the crime of robbery or, in this case, committed the crime of robbery, and if this other defendant, Dyer, was — situated, in pursuance of a previous agreement entered into between them, as that he was able in any way to render assistance or to aid or to abet the crime or he was there for that purpose, having the ability to do so, to prevent interruption or to aid in the escape, and the fact that his presence at that place in pursuance of a previous understanding had the effect upon the men who perpetrated the crime to inspire them to do it more quickly than they would have done it, that puts him in an attitude where he would be responsible under the law, just the same as though he — done the whole thing with his own hand. That is what is meant by the doctrone of constructive presence and real presence at the place of the crime. That is how persons may put themselves in an attitude where they may all be responsible for
40 what transpires. Of course a condition of that kind grows out of what the law calls a conspiracy. That means that the parties have agreed either expressly or tacitly to enter upon the enterprise, and, in the language of the law I have read to you, each takes the part assigned to him, each takes the position assigned him, for the purpose of in some way contributing to the result.

It is not necessary that you should find the existence of conspiracy by positive evidence. You cannot find it that way. It is a secret preparation for crime always. It must be secret, because if it was not it could not be consummated. There are two reasons why it is secret: one, that it may be carried out successfully, not interrupted

by honest people; and then, again, that those who are linked together by the conspiracy may not be discovered and punished afterwards. These are two reasons that make it, generally speaking, an undertaking that is entered into secretly. It is a private agreement or a tacit understanding that is entered into and confined to the breasts of those who enter into it. That, I say, is the underlying condition of joint action upon the part of men who enter upon the commission of a crime such as is charged in this indictment. You can find that by the circumstances; you can find it by the association of the parties either before or after the commission of the crime; you can find it by the part that they may have taken in the commission of the crime; you can find it by any fact or circumstance that points to the conclusion that the party or parties were thus united together so that they jointly entered upon the common criminal undertaking.

Now, when we come down to the testimony in this case it is necessary that the court should give you the status of these witnesses who are offered here upon the part of the Government—that is, the witnesses who admit that they were participants in
41 the crime and who tell you the relation that the other defendant bore to the transaction, the relation that he bore to the undertaking. They are called in the law "accomplices." They admit their criminality. They admit their participation in the crime. Now, it is a mistake that you cannot convict upon their testimony alone. You can do it. The law says you can, and I will read it to you presently. The law says you may convict upon that evidence alone. As a matter of fact you never do it; no jury ever does it. It is seldom the case where there is more than one witness in any case, whether they are witnesses who have participated in crimes or whether they are witnesses who have not become criminals, that the jury have to fix upon the testimony of one witness alone. There are things that surround the transaction that, if we get at them properly and weigh them as they really exist, *that* cannot be made to lie; no inducement can be brought to operate upon them. They are called circumstances, and it is especially important when an accomplice witness is introduced that all the facts and circumstances should be gathered up to see whether they corroborate what the accomplice says, to see whether they strengthen his testimony, because they do sustain it and do corroborate it. If it is corroborated by these circumstances and corroborated in such a way as to bring the identity of the party who may be charged with participation in the crime with them home to the place of the crime and to make him a participant in it, then you have the testimony of accomplices corroborated and consequently strengthened. Now, the law says it is always better and more prudent to do that with the testimony of an accomplice, though you may believe that evidence alone, if you think it worthy of belief, as it may be given to you and as its circumstances may give it verity. The law says this evidence is competent. It goes to the jury and is to be
42 passed upon by them in their effort to get at the truth of the case. As to how they are to view that evidence, what credit

they are to attach to it, the law points out to them, and while it leaves the evidence in their hands and the weight of it to be passed upon by them it tells them it is competent—that is, it goes to them, and the credibility of it is to be left to them. Touching the testimony of accomplices Mr. Greenleaf, in his work on Evidence, says:

"The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury. It has sometimes been said that they ought not to believe him unless his testimony is corroborated by other evidence, and, without doubt, great caution in weighing such testimony is dictated by prudence and good reason. But there is no such rule of law, it being expressly conceded that the jury may, if they please, act upon the evidence of the accomplice without any confirmation of his statement; but, on the other hand, judges, in their discretion, will advise a jury not to convict of felony upon the testimony of an accomplice alone and without corroboration, and it is now so generally the practice to give them such advice that its omission would be regarded as an omission of duty on their part."

In a case I will quote from the court said:

"Witnesses have been called in the course of the trial to testify, some of whom are under indictment in this court and have pleaded guilty to the charges presented against them. There has been much criticism of their testimony and considerable discussion of it. The court instructs you upon this subject that it is a settled rule in this country that even accomplices are competent, and that the Government has a right to use them as witnesses, and it is the duty
43 of the court to admit their testimony and that of the jury to consider it. The testimony of accomplices is, however, to be received with caution. The jury should not rely upon it unsupported unless it produces in their minds the most positive conviction of its truth. It is just and proper in such cases for the jury to seek for corroborating facts and circumstances in material respects, but this is not absolutely essential, provided the testimony of such witness produces in the mind of the jury full and complete conviction of its truth. You may believe it upon its own inherent strength, but it is always better to look for corroborating facts. As a rule, juries should look for these corroborating facts."

That is the law as it stands. You may believe it alone. It is more prudent; it is the better rule in all cases that you should look for corroborating facts. The law upon that proposition is that you should look through the case, when the testimony of such accomplice is offered you by the Government, to see whether there are facts corroborating his evidence. Again, it becomes necessary that you should see to what extent or in what part of his statement or in what part of the transaction there are corroborating facts, because he must be corroborated as to facts that are material to the case and by facts which show the connection outside of his evidence of the defendant with the transactions that identify him as a participant in the transaction. The corroboration should consist in some circumstance or circumstances that affect the identify of the accused, that show he was a participant in the robbery. The

accomplice should be corroborated as to the particular person who is charged with the offense. There must be some other facts and some other circumstances which bring the crime home to the defendant, which go to corroborate the statement of the accomplice. That is what is meant by corroborating his statement by some material evidence or evidence showing a material fact in the case.

44 Now, that is how the law regards the testimony of an accomplice of that character. He is called an "accomplice" witness, and I say to you in this case, as in all others, it is your duty to look through the case to see how far these accomplice witnesses have been corroborated. The law lays it down as an axiom that they are competent witnesses, and that the Government or prosecuting power, in the interest of the discovery of crime, has a right to use men who may have participated in the crime to get at the truth of the case, to see whether that crime has a source, to see whether or not it has a nesting place, to see whether or not behind the accomplice or accomplices there is somebody more skillful, with more ability, with more mental power to plan the act perpetrated by the hands of men who are actually at the front committing it. The Government, of course, seeks to find out that fact wherever it can in a truthful and proper way in order that the source of crime may be destroyed, because if you want to destroy a poisoned stream the best way is to go to the head of it and destroy the source from which it springs, to cut off the poison that puts the water in such a condition that it destroys life. So it is with crime. If you can by the use of accomplices bring other parties who may have planned enterprises or who may have participated in it, who may have been actually or constructively present at its commission, and they are there for the purpose of aiding in its commission or actually aiding in some way, though they may not have been right at the place of the crime, if this can be shown and if that party is the one who is the projector of the enterprise, the one who planned it, the one who started it, the one who puts the men upon the criminal mission, and he is in this way connected with the crime at the time of its *prepetration*, it is better then in the eye of the law to let the accomplice, who may with his own hand, if he is but the tool of others, if he is but the aider and abettor of another who may have planned the crime—it is better to let him

45 escape in order that the source of the crime may be cut off. That is the way the law regards it. That is why it is that governments as prosecuting powers may use agencies of that kind to uncover crime. That is the only object of any government or of any power that prosecutes. It has no other motive. Its object is to uncover crime, to find out who originated the crime, to find out who was connected with it, in order that the party for the public safety may be brought to justice. It has no other motive. It has no other feeling, and it has this motive and this feeling in the interests of peace and protection to which each innocent man and woman is entitled under the laws of this country, and the only way they can obtain it is by vigilance and activity and determination and courage upon the part of those who have the laws in their hands for

the purpose of administering them in order that criminals may be brought to justice.

In this case it is claimed by the Government that Lucky and Dyer, these two defendants, were participants in these crimes in such a way as to be responsible. It is claimed for Lucky, especially, and for Dyer that neither one were at the place of the crime at the time of its commission; that they were not so situated with reference to the place of that crime that they could be actually or constructively present at that time and participants in it. If that proposition is established in a way that it is credible, they are thus put in such an attitude as that they would be protected by what the law calls an alibi—that is, a state of case that locates them elsewhere than at the place of the crime. That testimony, if reliable, if credible, sets up an effective defense in the law, a defense that is so probative in its character as to protect every one who may be shielded by it, but it must go to a jury in such a way as that they can regard it as credible. There are certain characteristics
46 that it has that it is necessary that you should observe in order that you may make the proper application to the evidence that has been offered to sustain it. Now, before an alibi does amount to anything the people who undertake to locate a party at a given place at a given time must be able to circumstance that date. They must be able to give you facts and reasons why they know the party was at that place at that time, and you will bear in mind that all the evidence of that character is in direct conflict with all testimony that may go to accuse the defendant of participation in the crime. Let us go to the law and see what character this defense has in the law and how juries are to look to it to see whether or not it has been established.

To be effective, as I have told you, it must be established so as to be credible, and when established it must be of that character to show that at the time of the act that the defendants who seek to avail themselves of this alibi were not at the place of the crime, actually or constructively. To be effective, to amount to a defense, to put a case in an attitude where the defendant is protected by it, it must be of a character to make it physically impossible for him to have been at the place of the crime at the time of its commission. This evidence that is offered as alibi testimony is evidence that is always competent to go to a jury, but it is evidence that is to be viewed with a great deal of scrutiny for the reasons given by the law. If it is credible, if it appears to be a state of case that made it physically impossible for the party to have been with the other parties at the time of the commission of the robbery, then it would be effective. This defense is inconsistent with all allegations in the indictment as to the presence of the party. The indictment charges that the party or parties were participants in the crimes. The defense of alibi is inconsistent with all evidence that is
47 offered to sustain that allegation upon the part of the Government. An alibi that is not circumstances as proof amounts to but little. Its value depends upon the way it is circumstances.

Now, here is what is meant by sustaining an *alibi*:

The witness or witnesses must be able to give you detailed statements of such circumstances as to lead you to believe it is true, and that the defendant or defendant- could not have been at the place of the crime at the time of its commission. Now, a witness may be able to give you a set of circumstances which may have occurred, which may be true in every respect, and the falsehood may be only in applying them either purposely or by mistake to a different time or date or hour than that in which they occurred, and if this is done by mistake it constitutes a failure of the facts as proving facts, and if it is done willfully it is a contrivance by which pleas of alibi are made very difficult to disprove and so easy to fabricate. Because this is true, and because of the liability of witnesses to honest mistakes as to times or dates when things occur, and because it is so easy to fabricate a defense of this kind, a defense of that nature is often resorted to and is often attempted to be sustained and made effective by fraud, by subornation and perjury. Because a defense of this kind can with comparative ease be made effective by means of fraud, perjury, and falsehood, and the ease with which defenses of this kind can be fabricated, the proof offered to sustain an alibi must be submitted by you to a rigid scrutiny. In considering the strength of evidence necessary to sustain the defense of alibi it is obvious that all the testimony tending to show that the accused was at another place at the time of the crime is in direct conflict with that which tends to prove that he was at the place actually or constructively where the crime was committed at the time it was committed and actually assisted in its commis-
48 sion. There is this inconsistency between this evidence, and you are to reconcile the inconsistency upon the theory of an honest mistake, if you can—an honest mistake of witnesses as to dates, if you can—but if not, then you are to see where the truth lies, and in searching for the truth you are to bear in mind these admonitions I have given you as admonitions of the law in passing upon the evidence offered to sustain a defense of this character. You will bear in mind that it is a difficult matter for many people to agree upon a great number of circumstances and make them fit together if they are false. Therefore when men undertake to clothe a lie with falsehoods, so that it may be acceptable to honest people, it is not often that they undertake to clothe it with falsehoods that are purely circumstantial. They prefer to resort to positive statements—to positive evidence—because they can do that with greater ease. A defense of this kind is of that character that it may be circumstanced—it may be surrounded by circumstances that are entirely true in every particular except one, and that is the date upon which the circumstances that are offered to sustain the alibi occurred. They may have occurred upon a given day just as they are narrated. There is no necessity of fabricating the occurrence-, because they are true, and the witnesses can therefore all agree upon them, but the falsehood only consists in the fact of slipping the date of their occurrence. That is a thing easy to be done—easy to be accomplished—and therefore often resorted to to sustain false

defenses—often resorted to because they can be thus asserted and sustained by fraud, by subornation, and by perjury—by falsehood. That is why it is necessary to look at a defense of this character with that degree of care to enable you to see that the facts offered to sustain it are true, and that they are of such a character that
49 they locate the party at such a place as to make it impossible for him to have been at the place of the robbery actually or constructively, and it does not necessarily meant that he should have been right at the place, provided he is connected with it in any one of these ways that makes him a criminal or makes him a participant in it. You are to see whether he was at this place actually or constructively. This defense of alibi, to be effective, must remove him so far away from the place of the robbery as to make it impossible for him to have participated actually or constructively in it.

Now, that is the character of this defense. You are to see whether it is true or not, and in passing upon its truthfulness, as I have already told you, you are to take into consideration all the facts and circumstances. You are to see whether or not the parties in whose behalf it may be offered were participants in this crime or were away from the place and had no connection with it.

We now come, gentlemen, to the great bulk of evidence that has been offered here in this case upon the one side or the other, offered here upon the part of the Government for the purpose of accusing the parties charged, accusing Dyer and Lucky of this crime, and for the purpose of establishing that accusation beyond a reasonable doubt, and offered upon the other side for the purpose of exonorating them, for the purpose of showing that they did not participate in the crime. You are to look at all the facts and circumstances that have gone to you for either one of these purposes. You are to find what facts and circumstances are true. You are to pay no attention to a circumstance or fact that is a falsehood, because you are not here to come to conclusions from falsehoods, from that which may be absolutely false, from that which is injected into the case for the purpose of deceiving you. You are to be governed,
50 and your minds are to be illuminated, by the light of the truth alone. Therefore your first duty in passing upon evidence is to eliminate the truth from the false, to see what the truth establishes, see what propositions going to make out the case are established by the truth.

In passing upon the credibility of evidence you necessarily pass upon the credibility of its source, the witnesses. You are to consider the character of these witnesses. You even have the right to pass upon the character of their intelligence. You have a right to look at the way they give their statements. You have the right to view their testimony in the light of its consistency, its reasonableness, and its probability. You have the right and it is your duty to consider whether witnesses had the opportunity of knowing the facts that they claim they observed, whether they made the observations, whether they remember these facts correctly. All of these things are to be taken into account, and you are to consider the

interest that witnesses have in the case in passing upon their stat ments. The admonition in that respect has reference more directly to the parties who may be charged with the crime and who are upon trial for these crimes, because they are in a condition where the result of your finding affects them directly one way or another. Therefore they occupy such an attitude in the case, such a position, as their interest is very great, and you are to consider that. In weighing their evidence, in weighing their statements, you are to consider their statements in the light of that interest, as well as in the light of the other facts and circumstances in the case. If other facts corroborate them, they are strengthened, if those facts are true. If other facts contradict them, their statements are weakened; they are weaker than they would be, coming from them, situated with that degree of interest confronting them, if they were not
51 thus contradicted, if these contradicting facts are found by you to be true.

Efforts have been made here to impeach the testimony of witnesses in behalf not only of the defendant Lucky, but also in behalf of the defendant Dyer by proof of general bad character of the witnesses testifying against them. You are to receive the impeachment or the attempt at impeachment of that kind with caution. You are to weigh it with care. You are to look at it with discrimination. You have a right and it is your duty in trying these case to take into consideration your common knowledge, the common knowledge, even, that you may have gathered by observation since you have been setting in this court at this term, and you have a right to consider the frequency with which this attempt is resorted to. You have a right to consider that as a matter coming to you as common knowledge and which I can truthfully say is common knowledge to the court, and that there is but one of the twelve apostles if he lived in the Indian country that could not have been impeached, and that is Judas, and perhaps they might have attacked him; I don't know. It would have been easy to attack them from Paul to Peter, and there is not one of them who could not have been successfully impeached, if you believe everything that this crowd, this horde of scandal-mongers, that drive in here at the expense of the Government year after year ready to blacken the name of any created human being from the Saviour to the lowest creature on earth. I say this to you because it is common knowledge. It is common observation. It has been gathered here as knowledge for twenty years, gathered by every jury that has ever set in this court; and when you come to an attempt of that kind I ask you to look at it with care, look at it with caution, look at the motive that may be behind it, and bear in mind that this attempt upon char-
52 acter is one which brings in all the scandal existing in the neighborhood; it opens wide the door of hatred, of animosity, and a desire for vengeance and every personal evil consideration that may prompt the mind of a man. That is the truth about it. Therefore you are to see to it before you pay any attention whatever to that kind of an attack upon witnesses that those who come here to impeach are, in the first place, prompted by proper motives,

and, in the second place, they are competent to know what general character means, and, thirdly, that their statements are the fair and honest reflection of the opinion of the people generally in the neighborhood where they live.

Now, in looking at an impeachment of this kind it is material for you to observe whether this alleged bad character existed before the commission of this crime or before the commencement of this prosecution. It is true in the law that a witness's reputation may follow him even to the very witness-box, yet at the same time it is material and it is the duty of the jury to see when it commenced, because if it commenced afterwards, after there was a powerful motive upon the part of somebody to have it commence, it is weakened by that consideration. If it existed before that, and it was the opinion of the people generally in the neighborhood in such a reflected way, the witness would stand in a very different attitude from that in which he would stand if this thing was shown to have commenced after this prosecution or after the crime was committed, when parties were implicated or might be implicated in it, and it was necessary to break down the accusers in some way when they stood before a jury of the country. Now, in this case you are to see whether the evidence shows when it did commence, when it had an origin. If there is nothing showing that, then you have a right to take into consideration the presumption that it may be offered here for a purpose and that it may be made up for a
53 purpose. You are to pay attention to these admonitions upon this line, because it is in the interest of truth; it is in the interest of right; it is in the interest of the enforcement of the law.

There is another thing I shall admonish you in regard to, and that is as to these impeaching statements that may be set up *ex post facto*, that occur after witnesses come to the court or while they are on their way here. You will bear in mind that witnesses are dragooned and watched, and men and women are constantly looking around to see if they do not make some statement that they can make some use of. Statements that have this *ex post facto* character are weakened by their very nature; they are weakened by the very source from which they come, the very way in which they are obtained, and in passing upon statements that may be contradictory of that kind you are to take that fact into consideration. You are to take the fact into consideration that they may be picked at by these people who have an interest in doing that, and that they may be obtained, and at best they come to you second hand, and the most truthful person may have misunderstood the statement; but you are to look at the character of the witnesses and what relation they bear and the way it was they come to hear and where they were made and all about it in passing upon contradictory statements of that character.

Now, gentlemen, I have given you the rules of law that I conceive are to be applied in this case on one side or the other. It is for you to take the evidence and to be satisfied beyond a reasonable doubt that these defendants are guilty before you convict them. If you are so satisfied, and that they were participants in it in any one

of these ways, in these robberies named in the second, fifth, and sixth counts or any one of them, it is your duty to convict
54–56 them of all *there*, if you find they were participants in all *there*, or in such number of them as they may have been participants in. You will take into consideration these principles I have given you as the principles of the law. I say if you are satisfied from the evidence in this case that you may find to be true beyond a reasonable doubt that guilt has been established, your duty is to convict. Now, what does that mean? It means this: It means that every man is presumed to be innocent until he is proven guilty, but when the proof carries your minds to a point where you are able to say that you are satisfied that the charges have been established to that degree of certainty that you as reasonable men believe them in the same -ay that you would believe them if the case had been presented to you as twelve citizens, then it is established beyond a reasonable doubt, because then in contemplation of law there is no longer a real, substantial doubt confronting the conclusion or a doubt for which a good reason can be given, because the law contemplates that reasonable men upon matters of this importance affecting others do not come to conclusions as citizens until their minds are put in that position where they are so far convinced that they would be willing to act upon that conviction, first to believe it and then take whatever action duty called upon them to take.

Gentlemen, the case is with you. You will find forms of blank verdicts on the back of the indictment, the last one pertaining to Wade Chamberlee. That I have already instructed you upon. The other forms pertain to the other defendants, Dyer and Lucky. You will retire and make up your verdict.

Mr. THOMAS H. BARNES (of counsel for defendants): I have some exceptions I want to file.

The COURT: Yes.

57 To which charge of the court the defendant at the time filed the following exceptions, taken at the time of the delivery of the charge:

The defendant James Dyer excepts to the charge of the court—

1st. Because court instructs that if the defendant is so situated as to receive the party after the commission of the crime for that purpose he is guilty of the crime.

2nd. Because the court in its charge gives the law upon the theory of the defendant and others setting out to carry out a common criminal design, each performing a particular part, or the defendant aiding in escape, when the testimony does not show that the defendant set out upon such criminal mission with Root and others.

3rd. Because the court gives in charge a Nevada case, wherein a party was 35 miles away and lighted a signal fire to aid other stage-robbers, and a case where a party decoyed a clerk away from a store to a dance so that the store could be robbed, the said cases being inapplicable under the evidence and abstract and misleading in this case.

4th. As to what the court said as to evidence going or tending to show defendant was where his presence would encourage and strengthen the purpose of the men carrying out the robbery.

5th. Because the court, in giving the law as to the formation of the conspiracy and laying plans for the robbery charged, failed to charge the jury that proof *aliunde* or outside of the statements of accomplices must be made to show that the conspiracy was formed as charged.

6th. As to what the court says as to — the jury has a right to take into consideration from their common observation, gathered from their observations here in this court and elsewhere, and what the court says as to his own observations in this court and as to *ex post facto* statements gathered by witnesses on the way here and by laying around this court and otherwise, and the charge of the
58 court generally upon the impeaching testimony.

C. J. FREDERICK,
THOS. H. BARNES, AND
W. M. MELLETTE,
Attorneys for Dyer.

To all of which rulings of the court and the charge of the court to the jury the defendant at the time excepted, and hereby tenders his bill of exceptions and prays that the same may be signed and made a part of the record in this case, which is accordingly done.

I. C. PARKER,
U. S. Dist. Judge.

(Endorsed on back:) Filed in open court Oct. 22, 1895. Stephen Wheeler, clerk.

59 *Assignment of Errors.*

In the United States District Court for the Western District of Arkansas.

UNITED STATES
vs.
JAMES DYER.

The defendant James Dyer files this his assignment of errors committed on the trial of said cause:

1st. It was error of the court to charge the jury as follows:

"We now come to a proposition where a man need not be at the place of the crime. He may be a long distance from it, but if he is so situated that he can in any way aid or assist in its perpetration, as by standing upon watch to prevent interruption, or aid in the escape of the parties, or give information, or do anything else that may contribute to that crime, if he is so situated with reference to the place of the crime as that he is able to do this, then you are not to stop to measure the distance where he may be from the place of the crime by yards or rods. The test is his ability from his situation to in some way assist in the perpetration of the crime, in its

consummation, in carrying out the criminal design. If so, then he is not actually at the place of crime; he is constructively there in the law. Now, if he is so situated, and while so situated is doing anything to aid or assist or abet the crime, it is his act as well as the act of all those who may with their own hands do it. If he is so situated with reference to the place of the crime—that is, I mean the distance from it in pursuance of a common understanding—to become a participant in it, to aid in its perpetration by standing upon guard, by standing upon watch, by receiving the men who may come to him after the crime is committed, and he is there for that purpose, though he does not do it, because it is accomplished without that, because it is carried through without it, the law says he is responsible just as much as though he had entered upon
60 the thing himself and done the whole act. Now, I proceed to read you the law upon that subject. Under any of these propositions I have named the defendant would be a participant in it or either one of them if they were that way situated with reference to it, and the law would make them just as responsible as though they had done the whole thing with their own hands."

2nd. It was error for the court to charge the jury as follows:

"It becomes necessary to give you what is meant by being present at the place of the crime. There is actual presence, there is real presence, which means right at the place where the crime is committed, or there is constructive or legal presence, which means so near to the place *place* where the crime is committed as to be able to assist in the commission of it and to be actually assisting intentionally and knowingly or to be so situated with reference to the place of the crime as to be able to assist or abet intentionally or knowingly the crime which is committed. That is called in law constructive presence. It is, legally speaking, the same as real presence. The test of that presence is that he was so near to the place of the crime as to be able to assist or advise or counsel or abet the act as done. Then there comes in another subdivision, and that relates to how this assistance may be rendered, how it may be afforded the part- who commits the crime; but let us see for a moment as to what is meant by this idea of constructive presence. The law says that all persons who are knowingly and intentionally present at the time of the commission of a crime for the purpose of assisting in its commission, although one commit the act, provided all are proven to have confederated and engaged in the common design of which the perpetration of the crime is a part, become guilty of the crime as charged.

This doctrine of criminal combination is firmly established in our criminal jurisprudence, and the cases furnish numerous illustrations."

3rd. It was error for the court to charge the jury as follows:

"The test to determine whether he is a principal rather than an accessory is whether he is so situated as to make his per-
61 sonal help available; not actual physical help, necessarily, but help of any kind; not help rendered in or by actual presence, but constructive presence as well. Thus if he watched near by or

at a distance to prevent his companions being surprised or stationed himself to give the alarm to favor their escape or was in such situation as to come to their assistance, so that the knowledge of his watching or position inspired or was calculated to inspire his companions with additional confidence and enable them the quicker of more effectually to commit their crime, then he is a principal. It is hardly proper to call it moral support, because it is a sort of libel upon the word moral, but it is the exercise of intellectual influence; that is what it is. If a man is so situated with reference to the actual criminals—the actual perpetrators—he is watching at a distance to aid in any way, to give the alarm or to aid in their escape, and the fact that he is so situated with reference to the crime inspires the men who actually do the deed because they have got a place where they can escape to, they have a place where they can go, they have it at hand, they have assistance near by that they can call upon if it is necessary to call upon it—if that state of case exists, the law regards it as a condition where the men are inspired to commit the crime by the consciousness of that condition, by the consciousness of the fact that there is another party who is ready and willing to aid them, and it does undoubtedly exert a great influence upon the minds of criminals, because it is an undertaking that requires great courage to enter upon the highway of crime—to stop a railroad train, for example; to undertake to blow up the express car, and to overcome the passengers and relieve them of their money and of their property."

4th. It was error in the court to charge the jury as follows:

"Now, a word further as to what is meant by constructive presence. I have already told you that the test is that if a man is so near to the place, no matter how far in feet or yards he may be away, if from the circumstances, from the character of the act done, and the way it is done, he is so near to where it is actually
62 done as to be able to render assistance or to contribute to the production of that act, and he is there actually doing so or is there ready to do so wilfully and intentionally, present in pursuance of a previous agreement, and he confederated to render aid and assistance, he is *the* present in the law. As an illustration, take the case decided in Nevada, State *v.* Hamilton (13 Nev., 386), where the man was 30-odd miles away from the place where a stage was robbed. He built a fire on the top of a mountain to signal to his confederates the approach of the stage, they being down in the valley waiting to rob it. He was arrested as a principal in that crime, though as a matter of fact at the time of the robbery he was 30-odd miles away, but the law said he was present because the test of the law as to what is meant by presence is fully satisfied, because the proof showed that he was able to render assistance that looked towards the consummation of that crime, towards the completion of it, towards the execution of it.

In another case, that of Breeze *v.* State (12 Ohio State, 146), a man went to a store kept in the country and decoyed away the clerk who slept in the store and detained him at a dance while his confederates robbed the store. As a matter of fact, by yards or rods,

he was a long distance away from the place of the robbery, but in contemplation of the law he was present, because at the very time of the robbery he was able to render assistance and was actually rendering assistance by decoying the clerk away from the store and decoying him away with the purpose in view that his confederates should have a better opportunity to consummate the crime. Now, that is what is meant by actual and constructive presence."

5th. It was error in the court to charge the jury as follows:

"In this case it is claimed by the Government that Luckey and Dyer, these two defendants, were participants in these crimes in such a way as to make them responsible. It is claimed for Luckey, especially, and for Dyer that neither one were at the place of the crime at the time of its commission; that they were not so situated with reference to the place of that crime that they could be actually
63 or constructively present at the place and participants in it. If that proposition is established in a way that is credible, they are thus put in such an attitude as that they would be protected by what the law calls an alibi—that is, a state of case that locates them elsewhere than at the place of the crime; that testimony, if reliable, if credible, sets up an effective defense in the law, a defense that is so probative in its character as to protect every one who may be shielded by it, but it must go to the jury in such a way as that they can regard it as credible. There are certain characteristics that it has that it is necessary that you should observe in order that you may make the proper application to the evidence that has been offered to sustain it. Now, before an alibi does amount to anything the people who undertake to locate a party at a given place at a given time must be able to circumstance that date. They must be able to give you facts and reasons why they know the party was at the place at that time, and you will bear in mind that all the evidence of that character is in direct conflict with all testimony that may go to accuse the defendant of participation in the crime. Let us go to the law and see what character this defense has in the law and how juries are to look to see whether or not it has been established. To be effective, as I have told you, it must be established so as to be credible, and when established it must be of that character to show that at the time of the act that the defendants who seek to avail themselves of this alibi were not at the place of the crime, actually or constructively. To be effective, to amount to a defense, to put a case in an attitude where the defendant is protected by it, it must be of a character to make it physically impossible for him to have been at the place of the crime at the time of its commission. This evidence that is offered as alibi testimony is evidence that is always competent to go to a jury, but it is evidence that is to be viewed with a great deal of scrutiny for the reason given by the law. If it is credible, if it appears to be a state of case that made it physically impossible for the party to have been with the other
64 parties at the time of the commission of the robbery, then it would be effective. This defence is inconsistent with all allegations in the indictment as to the presence of the party. The indictment charges that the party or parties were participants in

the crime. The defense of alibi is inconsistent with all evidence that is offered to sustain that allegation upon the part of the Government. An alibi that is not circumstanced as proof amounts to but little; its value depends upon the way it is circumstanced.

Now, here is what is meant by sustaining an alibi. The witness or witnesses must be able to give you detailed statements of such circumstances as to lead you to believe it is true and that the defendant or defendant- could not have been at the place of the crime at the time of its commission. Now, a witness may be able to give you a set of circumstances which may have occurred which may be true in every respect and the falsehood may be only in applying them, either purposely or by mistake, to different time or date or hour than that in which they occurred, and if this is done by mistake it constitutes a failure of the facts as proving facts, and if it is done wilfully it is a contrivance by which pleas of alibi are made very difficult to disprove and so easy to fabricate. Because this is true, and because of the liability of witnesses to honest mistakes as to times or dates when things occur, and because it is so easy to fabricate a defense of this kind, a defense of that nature is often resorted to and is often attempted to be sustained and made effective by fraud, by subornation and perjury. Because a defense of that kind can, with comparative ease, be made effective by means of fraud, perjury, and falsehood, and the ease with which this kind can be fabricated, the proof offered to sustain an alibi must be submitted by you to a rigid scrutiny. In considering the strength of evidence necessary to sustain the defense of alibi it is *of this* that all the testimony tending to show that the accused was at another place at the time of the crime is in direct conflict with that which tends to prove that he was at the place, actually or constructively, where the crime was committed at the time it was committed and actually assisted in its commission. There is this inconsistency between this evidence, and you are to reconcile the inconsistency upon the theory of an honest mistake if you can, an honest mistake of witnesses as to dates if you can, but if not, then you are to see where the truth lies, and in searching for the truth you are to bear in mind these admonitions I have given you as admonitions of the law in passing upon the evidence offered to sustain a defence of this character. You will bear in mind that it is a difficult matter for many people to agree upon a great number of circumstances and make them fit together if they are false. Therefore when men undertake to clothe a lie with falsehoods so that it may be acceptable to honest people it is not often that they undertake to clothe it with falsehoods that are purely circumstantial. They prefer to resort to positive statements, to positive evidence, because they can do that with greater ease. A defense of this kind is of that character that it may be circumstanced, it may be surrounded by circumstances that are entirely true in every particular except one, and that is the date upon which the circumstances that are offered to sustain the alibi occurred. They may have occurred upon a given day just as they are narrated; there is no necessity of fabricating the occurrence

because they are true, and the witnesses can therefore all agree upon them, but the falsehood only consists in the fact of slipping the date of their occurrence. That is a thing easy to be done, easy to be accomplished, and therefore often resorted to — sustain false defense, often resorted to because they can be thus asserted and sustained by fraud, by subornation and perjury, by falsehood. That is why it is necessary to look at a defense of this character with that degree of care to enable you to see that the facts offered to sustain it are true, and that they are of such a character that they locate the party at such place as to make it impossible for him to have been at the place of the robbery actually or constructively, and it does not necessarily mean that he should have been right at the place of the robbery, provided he is connected with it in any one of these ways that makes him a criminal or makes him a participant in it. You
66 are to see whether he was at this place actually or constructively. This defense of an alibi to be effective must remove him so far away from the place of the robbery as to make it impossible for him to have participated actually or constructively in it."

6th. It was error for the court to charge the jury as follows:

"We now come to the conclusion where a man need not be at the place of the crime. We now come, gentlemen, to the great bulk of evidence that has been offered here in this case upon one side or the other, offered here upon the part of the Government for the purpose of accusing the parties charged, accusing Dyer and Luckey of this crime, and for the purpose of establishing that accusation beyond a reasonable doubt, and offered upon the other side for the purpose of exonerating them, for the purpose of showing that they did not participate in the crime. You are to look at all the facts and circumstances that have gone to you for either one of these purposes. You are to find what facts and circumstances are true. You are to pay no attention to a circumstance or fact that is a falsehood, because you are not here to come to conclusions from falsehoods, from that which may be absolutely false, from that which is injected into the case for the purpose of deceiving you. You are to be governed and your minds are to be illuminated by the light of truth alone. Therefore your first duty in passing upon evidence is to eliminate the true from the false, to see what the truth establishes, see what propositions going to make out the case are established by the truth. In passing upon the credibility of evidence you necessarily pass upon the credibility of its source—the witnesses. You are to consider the character of these witnesses. You even have the right to look at the way they give their statements. You have a right to view their testimony in the light of its consistency, its reasonableness, and its probability. You have the right and it is your duty to consider whether witnesses had the opportunity of knowing the facts that they claim they observed, whether they made the observations, whether they remember these facts correctly. All of these things are to be taken into account, and you are to consider the interest that
67 witnesses have in the case in passing upon their statements. The admonition in that respect has reference more directly

to the parties who may be charged with the crime and who are upon trial for these crimes, because they are in a condition where the result of your finding affects them directly one way or the other. Therefore they occupy such an attitude in the case, such a position, as their interest is very great, and you are to consider that. In weighing their evidence, in weighing their statements — *as well as* in the light of that interest as well as in the light of other facts and circumstances in the case. If other facts corroborate them, they are strengthened, if those facts are true. If other facts contradict them, their statements are weakened; they are weaker than they would be, coming from them, situated with that degree of interest confronting them, if they are not thus contradicted, if these contradicting facts are found by you to be true.

7th. It was error of the court to charge the jury as follows:

"Efforts have been made here to impeach the testimony of witnesses in behalf not only of the defendant Luckey, but also in the behalf of the defendant Dyer, by proof of general bad character of the witnesses testifying against them. You are to receive the impeachment or the attempt at impeachment of that kind with caution. You are to weigh it with care. You are to look at it with discrimination. You have a right and it is your duty in trying this case to take into consideration your common knowledge, the common knowledge, even, that you may have gathered by observation since you have been sitting in this court at this term, and you have a right to consider the frequency with which this attempt is resorted to. You have a right to consider that as a matter coming to you as common knowledge and which I can truthfully say is common knowledge to the court, and that there is but one of the twelve apostles if he lived in the Indian country that could not have been impeached, and that is Judas, and perhaps they might have attacked him; I do not know. It would have been easy to attack them from Paul to Peter, and there is not one of them who could not have been successfully impeached, if you believe everything that this crowd, this horde
68 of scandal-mongers, that drive in here at the expense of the Government year after year ready to blacken the name of any created human being from the Saviour to the lowest creatures on earth. I say this to you because it is common knowledge; it is common observation; it has been gathered by every jury that has ever sat in this court; and when you come to an attempt of that kind I ask you to look at it with care, look at it with caution, look at the motive that may be behind it, and bear in mind that this attempt upon character is one which brings in all the scandal existing in the neighborhood; it opens wide the door of hatred, of animosity, and a desire for vengeance and every personal evil consideration that may prompt the mind of man; that is the truth about it. Therefore you are to see to it before you pay any attention whatever to that kind of attack upon witnesses; that those who come here to impeach are, in the first place, prompted by proper motives, and, in the second place, they are competent to know what general character means, and, thirdly, that their statements are the fair and honest reflection of the people generally in the neighbor-

hood where they live. Now, in looking at an impeachment of this kind it is material for you to observe whether this alleged bad character existed before the commission of this crime or before the commencement of this prosecution. It is true in law that a witness's reputation may follow him even to the very witness-box; yet at the same time it is material and it is the duty of the jury to see when it commenced, because if it commenced afterwards, after there was a powerful motive upon the part of somebody to have it commence, it is weakened by that consideration. If it existed before that and it was the opinion of the people generally in the neighborhood in such a reflected way, the witness would stand in a very different attitude from that in which he would stand if this thing was shown to have commenced after this prosecution or after the crime was committed, when parties were implicated or might be implicated in it, and it was necessary to break down the accusers in some way when they stood before a jury of the country. Now, in this case you are to see when the evidence
69 did commence—when it had an origin. If there is nothing showing that, then you have a right to take into consideration the presumption that it may be offered here for a purpose and that it may be made up for a purpose. You are to pay attention to these admonitions upon this line, because it is in the interest of truth; it is in the interest of right; it is in the interest of the enforcement of the law. There is another thing I shall admonish you in regard to, and that is as to these impeaching statements that may be set up *ex post facto*, that occur after the witnesses come to the court or while they are on their way here. You will bear in mind that witnesses are drago-ned and watched, and men and women are constantly looking around to see if they do not make some statement that they can make some use of. Statements that have this *ex post facto* character are weakened by their very nature; they are weakened by the very source from which they come—the very way in which they are obtained—and in passing upon statements that may be contradictory of that kind you are to take that fact into consideration. You are to take the fact into consideration that they may be picked at by these people who have an interest in doing that, and that they may be obtained, and at best they come to you second hand, and the most truthful person may have misunderstood the statement; but you are to look at the character of the witnesses and what relation they bear and the way it was they come here and where they were made and all about it in passing upon contradictory statements of that character.

8th. It was error to charge the jury as follows:

"Now, gentlemen, I have given you the rules of the law that I consider are to be applied in this case on the one side or the other. It is for you to take the evidence and to be satisfied beyond a reasonable doubt that these defendants are guilty before you convict them. If you are so satisfied and that they were participants in it in any one of these ways—in these robberies named in the second, fifth, and sixth counts or any one of them—it is your duty to convict

them of all three, if you find they were participants in all
70 three, or in such number of them as they may have been participants in. You will take into consideration these principles I have given you as the principles of law. I say if you are satisfied from the evidence in this case that you may find to be true, beyond a reasonable doubt, that guilt has been established, your duty is to convict. Now, what does that mean? It means this: It means that every man is presumed innocent until he is proven guilty, but when the proof carries your minds to a point where you are able to say that you are satisfied that the charges have been established to that degree of certainty that you as reasonable men believe them in the same way that you would believe them if the case had been presented to you as twelve citizens, then it is established beyond a reasonable doubt, because then, in contemplation of the law, there is no longer a real, substantial doubt confronting the conclusion or a doubt for which a good reason can be given, because the law contemplates that reasonable men upon matters of this importance affecting others do not come to a conclusion as citizens until their minds are put in that position where they are so far convinced that they would be willing to act upon that conviction—first, to believe it, and then take whatever action duty called upon them to take."

9th. It was error for the court to charge the jury that if the defendant is so situated as to receive the party after the commission of the crime for that purpose he is guilty.

10th. It was error for the court to charge the jury upon the theory that the defendant had set out to carry out a common criminal design, each performing a particular part, or the defendant aiding in the escape, when the testimony does not show that the defendant set out upon such criminal mission with Root and others.

11th. It was error for the court to fail to charge the jury that proof *aliunde* or outside of the statements of accomplices must be made to show that the conspiracy was formed as charged.

71 12th. It was error for the court to charge the jury in a general way throughout the charge upon the theory that the defendant James Dyer could be guilty as charged for acts committed after the commission of the crime done by Root, Reed, and others.

Wherefore, the above-stated errors considered, the said defendant, James Dyer, prays that the judgment and sentence against him be reversed and a new trial be granted him.

JAMES DYER,
By BARNES & MELLETTE,
C. J. FREDERICK,
His Attorneys.

(Endorsed on back:) Filed Oct. 25, 1895. S. Wheeler, clerk, by I. M. Dodge, D. C.

72 *Petition for Writ of Error.*

United States District Court, Western District of Arkansas.

UNITED STATES
vs.
JAMES DYER.

To the clerk of the United States district court for the western district of Arkansas:

Your petitioner, James Dyer, represents that at the August term, 1895, of said court he was convicted on an indictment charging him with the crime of robbery, and that the said court has pronounced judgment and sentence upon the verdict of the jury convicting him as aforesaid. Your petitioner alleges that in the record and proceedings in the trial of said cause there is great and manifest error, to the prejudice and great damage of your petitioner.

He therefore prays that a writ of error from the Supreme Court of the United States be issued under the seal of said district court in said cause removing said cause and the record therein to the said Supreme Court in order that the same may be there examined, and, if error be found, that judgment and sentence against him therein may be reversed.

He also asks the court to grant him bail and supersedeas pending appeal.

JAMES DYER,
By C. J. FREDERICK AND
BARNES & MELLETTE.

(Endorsed on back:) Filed Oct. 25, 1895. S. Wheeler, clerk, by I. M. Dodge, D. C.

73 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the western dist. of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between The United States, plaintiff, against James Dyer, a manifest error hath happened, to the great damage of the said James Dyer, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that

you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25 day of October, in the year of our Lord one thousand eight hundred and ninety-five.

STEPHEN WHEELER,
Clerk of the Dist. Court of the United States
for the Western Dist. of Ark.,
By I. M. DODGE, *D. C.*

Allowed by—

I. C. PARKER,
U. S. Dist. Judge.

74 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the western district of Arkansas, wherein James Dyer — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable I. C. Parker, U. S. district judge for the western district of Arkansas, this 25th day of October, in the year of our Lord one thousand eight hundred and ninety-five.

I. C. PARKER,
Justice of the Supreme Court of the United States.

On this 25th day of Oct., 1895, I hereby accept service of the within citation.

JAS. F. READ, *U. S. Att'y.*

75 UNITED STATES OF AMERICA, }
Western District of Arkansas. }

I, Stephen Wheeler, clerk of the district court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript annexed to this certificate is a true and complete copy of the record and proceedings in the case of U. S. *vs.* James Dyer, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 10 day of Dec., A. D. 1895.

{ The Seal of the District Court, Fort Smith, Western District of Ark., U. S. A. }

STEPHEN WHEELER, *Clerk*,
By I. M. DODGE, *D. C.*

Endorsed on cover: Case No. 16,171. W. Arkansas D. C. U. S. Term No., 881. James Dyer, plaintiff in error, *vs.* The United States. Filed February 3, 1896.

64-704

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

164-704

JAMES DYER, Plaintiff in Error,
vs.
THE UNITED STATES.
No. 429.

In Error to the District Court of the United States for the Western District of Arkansas.

Brief for Plaintiff in Error.

The plaintiff in error was indicted, with several others, for robbing six different white individuals, and not red men, in the Indian country, on the 13th of November, 1894. On a plea of not guilty a trial was had, and upon the testimony offered and quite a voluminous charge by the court, Dyer was convicted on the 2d, 5th, and 6th counts, and an attempt was made by the court to sentence him to five years' imprisonment on each count (Rec., 10, 11, and 12), but the attempt was a failure in law, as will be shown after a while. Exceptions were saved during the trial, and were properly presented and put of record. (Rec., 13–37.)

There are six exceptions to the discourse of the judge to the jury. (Rec., 37, 38.)

Before going to the errors complained of arising on the trial, upon the merits of the case, it is deemed best to notice some matters outside of the trial as appear of record.

On August 20, 1895, Dyer moved, in due form of law, for witnesses to be summoned for him at the expense of the United States; the court ordered some six persons to be so summoned (Rec., 6–7). On the 5th of September, 1895, he made a similar motion, as the record shows, with proper affidavit, but the court refused it, assigning no reason therefor (Rec., 6–7). This right here sought is guaranteed to the defendant in criminal cases by § 878, R. S., and it gives the judge no discretion whatever as to the number. The defendant makes the required affidavit under this section (878) and it is not for the judge to limit and divide the application. It is supposed the party knows better than the judge who is an important witness for him, and here it is seen about a half month expires between the first and second applications, a time in which the party might well find out more of the facts and the persons knowing them. This is a vital right, and to limit or question it is to deny the party a fair trial.

Spear Fed. Judic., 411, 433.

The word *may* used in section 878, means of course *must;* it is mandatory in every sense.

Minor v. *Mechanics' B'k*, 1 Pet., 46;
Ritchie v. *Franklin Co.*, 22 Wall., 67;
Endlich Int. Stats., § *307, and notes.*

This court has ruled, *Harding's Case* (120 U. S., 782), that this is no ground for releasing a party on *Habeas corpus.* True, this is no jurisdictional question; but it is an error committed against the party in course of trial, and it is patent in the record brought here by writ of error direct.

The court below assessed punishment on Dyer under the 2d count for five years' imprisonment; on the 5th count five more years were put on, to begin when those under the 2d count expired; and on the 6th count five more years were put on, to begin, also, *when those under the 2d count expired.* This was clearly erroneous.

Sandel & H. Digest, 1894 (Ark.), *sec. 2288;*
Barb. Cr. L., 371.

And that it is such an error as will cause reversal there can be doubt. This punishment, as fixed, just as a whole, Dyer stands now doomed to fifteen years' imprisonment, and the whole judgment must be reversed.

James v. *Ward,* 2 Met. (Ky.), 271;
Tully v. *Com.,* 4 Met. (Mass.), 357;
Daniels v. *Com.,* 7 Pa., 371;
Wilde v. *Com.,* 2 Met. (Mass.), 408;
State v, *Gray,* 8 Vroom, 368;
Rex v. *Ellis,* 5 B. & C., 395;
Browne v. *Rex,* 2 Nev. & P., 248 (1 Jur., 542);
Silversides v. *Rex,* 2 Gale & D., 617;

A punishment impossible of performance or of execution has been placed upon Dyer, and it is therefore a nullity, and the case should be reversed.

The Indictment.

The indictment charges Dyer and several others jointly with having committed six different robberies on the same day, and it does not appear it was a good day for that business either. There is no charge in the indictment whatever that these men combined, conspired, or confederated together to do these acts. There are no words in the statute allowing joining of offences and consolidating indictments that justifies this proceeding: (§ 1024,

Rev. S.) No provision is made for joining different persons in this way, but it refers alone to separate offences. It would be allowable if the charge were that they, Dyer and others, had conspired to do these acts. But there is no such charge or intimation in the indictment; and upon its face the offences are as separate and distinct as if committed at different times, and miles apart. The charge then stands as one against two or more persons for committing offenses several in their nature, and they can not be joined in the same indictment.

State v. *Nail*, 19 Ark., 563;
Com. v. *Gillespie*, 7 S. & R. (Pa.), 469;
Lindsey v. *State*, 48 Ala., 169;
Elliott v. *State*, 26 Ala., 78;
Lewellyn v. *State*, 18 Tex., 538;
People v. *Hawkins*, 34 Cal., 181;
Vaughan v. *State*, 4 Mo., 530;
U. S. v. *McDonald*, 3 Dill, 533;
U. S. v. *Davis*, 33 Fed. R., 621;
Reg v. *Devet*, 8 Carr. & P., 561;
Rex v. *Phillips*, 2 Str., 921;
Reg v. *Dovey*, 1 Law J. Rep. (N. S.), M. C., 105.

These parties were evidently convicted of doing certain acts according to a conspiracy to do them, yet there is no charge that they combined or conspired so to do, as there should have been. The rule as to this is universal and unyielding.

U. S. v. *Watson*, 17 Fed. R., 145;
Smith v. *State*, 93 Ind., 67;
U. S. v. *Britton*, 108 U. S., 199;
3 Greenl. Ev., sec. 89, et. seq.

And this is such a defect, material and essential, as no statute of jeofails or amendment will cure by verdict, as might be in civil cases.

Barb. Cr. L., 372;
1 Chit. Cr. L., 661;
Com. v. *Hearsy*, 1 Mass., 138, 139.

Dyer had a right to be informed of all the particulars upon which he was sought to be convicted of robbery, so that he could prepare himself to defend against them. He had here no notice of any charge of conspiracy till on the trial the Government introduced its testimony; then, upon the plainest principles, so well and so often recognized by this court, he can not be held on this indictment.

U. S. v. *Brewer*, 139 U. S., 278.

Todd v. US. 158 US. 278:

And it is not within the power of this court to see this man condemned upon an insufficient indictment.

True, exceptions were not made and reserved in the proceedings to the several matters above presented, but they are such patent errors, such gross irregularities, this court is compelled to notice them, and will not fail to do so. Both Rule 35 (1st par.) and 21 (4th par.) allow this, and numerous decisions make it a duty of the court to do so.

Clasen v. *U. S.*, 142 U. S., 140;
Lewis v. *U. S.*, 146 *ib.*, 370;
Todd v. *U. S.*, 158 *ib.*, 278;
Wiborg v. *U. S.*, 163 *ib.*, 658.

Hopt v Utah 110 U.S. 574-9; Schaub v. Berggren 143 US. 442-8;

And it is respectfully but earnestly submitted, rule or no rule, decision or no decision, this party on appeal stands upon all his rights, yielding nothing, by himself or his counsel; and it is the duty of this court to see he is not illegally deprived of his liberty, as the public has an interest in his life and liberty. Unlike a mere civil case, there is nothing waived, or can be waived, by implication; and on appeal the court must see to it he is not deprived of life or liberty except all legal requirements are complied with. This the Supreme Court of Arkansas has long since ruled (Sweeden *v.* The State,

19 Ark., 205), and her law and practice form the basis of the law and practice of the court from which came this case.

The Exceptions Taken at the Trial.

There are six exceptions taken at the trial and properly saved, and they refer solely to the charge, so-called, of the court to the jury, and its onslaught on Dyer (Rec., 37 and 38), and they are these:

"*The defendant James Dyer excepts to the charge of the court—*

1st. Because court instructs that if the defendant is so situated as to receive the party after the commission of the crime for that purpose he is guilty of the crime.

2d. Because the court in its charge gives the law upon the theory of the defendant and others setting out to carry out a common criminal design, each performing a particular part, or the defendant aiding in escape, when the testimony does not show that the defendant set out upon such criminal mission with Root and others.

3d. Because the court gives in charge a Nevada case, wherein a party was thirty-five miles away and lighted a signal fire to aid other stage robbers, and a case where a party decoyed a clerk away from a store to a dance so that the store could be robbed, the said cases being inapplicable under the evidence and abstract and misleading in this case.

4th. As to what the court said as to evidence going or tending to show defendant was where his presence would encourage and strengthen the purpose of the men carrying out the robbery.

5th. Because the court, in giving the law as to the formation of the conspiracy and laying plans for the robbery charged, failed to charge the jury that proof aliunde or outside of the statements of accomplices must be made to show that the conspiracy was formed as charged.

6th. As to what the court says as to — the jury has a right to take into consideration from their common observation, gathered from their observations here in this court and elsewhere, and what the court says as to his own observations in this court and as to the ex post facto statements gathered by witnesses on the way here and by laying around this court and otherwise, and the charge of the court generally upon the impeaching testimony."

The assignment of errors (Rec., 38–46) points out the defects and misconceptions in the homily of the court on criminal law, and the law of conspiracy, with more precision and more at length than do the exceptions, as the exceptions had to be taken and noted while the judge was on the wing, and no time could be lost, but the assignments were made after the flight had ended and the judge, to some extent, had poised himself and subsided into quiet and repose.

This screed of the judge, covering some seventeen closely-printed pages (Rec., 20–37) of the record, could only perplex, disconcert, distract, confuse, and confound the jury, and mislead them in their investigation of the case. The assignment of errors, to which the attention of the court is specially invited, shows particularly wherein this speech to the jury did just what we claim, and but little else is needed in this brief on these points; and close consideration of the points noted in these errors assigned will render any lengthy argument here useless.

(*a*) When the court below instructed the jury that if the defendant is so situated as to receive the party after the commission of the crime, for that purpose he is guilty of the crime, it flew almost violently in the face of the law. Much more than that is required to make out the crime as to Dyer, and that is far from being sufficient to bring him in direct touch with the alleged crime.

3 Greenl. Ev., sec. 89 et seq.;
Ib., sec. 40–49.

(*b*) And the record shows nothing whatever, to establish the fact, that Dyer set out with Root and others upon any criminal mission. This was abstract, and we need cite no authority here to show such instructions are glaringly and grossly erroneous. But no court has been more disquieted by such instructions than this court, as shown in *Davis* v. *Patrick* (122 U. S.,138), where it is held, any instruction based upon a theory unsupported by evidence, and upon which the jury *may* have rendered their verdict, is erroneous.

(*c*) The same may be said as to the language of the court touching the presence of Dyer to encourage the purpose of the men carrying out the robbery ; and it is faulty because the foundation was not laid in first establishing the combined purpose ; (*Greenleaf, sup., Logan's case, 144 U. S., 164*) ; and the Nevada case cited and dwelt upon by the court below with decided emphasis could only mislead the jury, as it was not much more pertinent to the facts of this case than our President's recent Thanksgiving Proclamation.

(*d*) So the remarks to the jury as to proof *aliunde* are outside of the statement of accomplices. The court throughout its disquisition mistakingly assumes the conspiracy is proved.

(*e*) And the language of the court in telling the jury what they are to take into consideration, or have the right to consider in the 6th exception, is too wild for comment. The jury must know nothing of facts except those brought out before them on the trial. The very definition of the word jury ought to have prevented the court below from committing this error, viz., "a body of men who are sworn to declare the facts of a case as they are proven from the evidence placed before them."

2 Bouv. L. Dic., p. 27.

Discussing the right of the jury to take into consideration outside knowledge, observations, etc., *Best* Pr. Ev. (Chamberlayne Ed.), p. 81, § 88, says: "It is obvious, that if they were allowed to decide on impressions, or on information acquired elsewhere, not only would it be impossible for a superior tribunal, the parties, or the public to know on what grounds the decision proceeded, but it might be founded on common rumor, or other forms of evidence, the very worst instead of the best." This rules out as viciously erroneous all the address of the court to the jury, as to their common knowledge, their observations, their impressions, as well as those of the judge, and all those allusions to Judas, Peter, and Paul.

A word or two as to the charge of the court touching conspiracy, combination, etc., to support the view above taken, that the indictment should have averred the combination or confederation, as it is evident from the exhortation of the court to the jury, this is the foundation of the whole affair; that is, these parties robbed under a previously-formed plan, under a conspiracy to do so. The whole oration of the court is based upon this idea, so is the testimony; and we, therefore, repeat, the indictment is insufficient in not averring this, and it is such a defect as the verdict cures not.

Very respectfully submitted.

A. H. GARLAND and
R. C. GARLAND,
For Dyer.